(8)

No. 90-857-CFX
Status: GRANTED

Title: Marc Gilbert Doggett, Petitioner
v.
United States

Docketed:
November 30, 1990

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Sheppard,Wm. J.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Nov 30 1990	G	Petition for writ of certiorari filed.
2	Nov 30 1990		Appendix of petitioner filed.
4	Jan 2 1991		Order extending time to file response to petition until February 1, 1991.
5	Feb 1 1991		Brief of respondent United States in opposition filed.
6	Feb 6 1991		DISTRIBUTED. February 22, 1991
7	Feb 25 1991		Petition GRANTED.
			**********
9	Mar 18 1991		Order extending time to file brief of petitioner on the merits until April 26, 1991.
10	Apr 10 1991		Record filed.
		*	certified copy of original record on appeal and proceedings, 13 vols. (Box)
11	Apr 26 1991		Joint appendix filed.
12	Apr 26 1991		Brief of petitioner Marc Gilbert Doggett filed.
14	May 29 1991		Brief of respondent United States filed.
15	Jun 27 1991	G	Application (A90-985) to extend the time to file a reply brief from July 1, 1991 to July 15, 1991, submitted to Justice Kennedy.
16	Jun 28 1991		Application (A90-985) granted by Justice Kennedy extending the time to file until July 15, 1991.
17	Jul 15 1991		CIRCULATED.
18	Jul 15 1991	X	Reply brief of petitioner Marc Gilbert Doggett filed.
19	Jul 19 1991		SET FOR ARGUMENT WEDNESDAY, OCTOBER 9, 1991. (3RD CASE)
20	Oct 9 1991		ARGUED.

90-857

Supreme Court, U.S.
FILED
NOV 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

MARC GILBERT DOGGETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WM. J. SHEPPARD
ELIZABETH L. WHITE
SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, Fl. 32202
(904) 356-9661

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition are:

(1) Where taken together, three of the four factors set forth in Barker v. Wingo, 407 U.S. 514 (1972), weigh in favor of the accused, should an additional mandatory requirement of actual prejudice be imposed in order for the accused to prevail on a claim that his right to a speedy trial has been violated; and

(2) Has Moore v. Arizona, 414 U.S. 25 (1975), which holds that an affirmative demonstration of prejudice is not required, been reversed?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Marc Gilbert Doggett respectfully prays that a Writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on July 19, 1990.

OPINION BELOW

The Court of Appeals affirmed the district court's ruling on July 19, 1990, with opinion and a separate dissent. United States v. Doggett, 906 F.2d 573 (11th Cir. 1990) (See Appendix C). A timely petition for rehearing was denied on September 12, 1990. (See Appendix D).

JURISDICTION

The opinion with dissent by the United States Court of Appeals for the Eleventh Circuit was entered on July 19, 1990. A timely petition for rehearing en banc was denied on September 12, 1990. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case requires interpretation of the speedy trial provision in the Sixth Amendment to the United States

Constitution, which provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...."

STATEMENT OF THE CASE

The petitioner, Mr. Marc Gilbert Doggett, is thirty-three years old, married, and gainfully employed. For the past seven years, he has lived continuously, openly and honestly in the Reston, Virginia area under his true name while working, voting, going to school, and paying taxes. Mr. Doggett met his wife, Delores Doggett, in the fall of 1982, and married her in October, 1983, in Reston, Virginia, where they have resided since.

Mr. and Mrs. Doggett have never concealed their identities. Since his marriage in 1982, Mr. Doggett has never

been in any kind of legal trouble, with the exception of minor traffic tickets. Mr. Doggett is a registered voter, has a Virginia driver's license, has several credit cards in his name, and files federal income tax returns. In short, there is no evidence that he has ever sought to conceal his identity or avoid detection, and indeed no evidence that Mr. Doggett ever knew that there was an indictment issued against him.

Unbeknownst to the petitioner, he had in fact been indicted in 1980 for alleged peripheral involvement in a cocaine distribution conspiracy. On February 22, 1980, the petitioner was indicted in the United States District Court for the Middle District of Florida, Jacksonville Division, on charges of conspiracy to import cocaine in violation of 21 U.S.C. 963 and

conspiracy to distribute cocaine in violation of 21 U.S.C. 846. That same day, a warrant for the petitioner's arrest was issued. It was not executed, however, until September 5, 1988, some eight and a half years later.

Immediately upon issuing the arrest warrant to the United States Marshal's Office in 1980, Agent Douglas Driver of the Drug Enforcement Agency, the case agent who had conducted the investigation of petitioner, sent a memorandum to the United States Marshal's Office indicating that the Drug Enforcement Agency would handle the arrest. That memo had the intended effect of taking the petitioner's name out of the Marshal's system until further notice, thus relieving the Marshal's office from any responsibility for arresting the petitioner.

Twenty-six days after the issuance of the arrest warrant, Agent Driver had an agent of the North Carolina State Bureau of Investigation, Agent Charles Overton, and Officer Larry Rawlins of the Wake County Beverage Control Office, go to the petitioner's parents' house in Raleigh, North Carolina to arrest him.

On March 18, 1980, Agent Overton interviewed petitioner's mother, Leonor Pinzon Doggett. Mrs. Doggett informed the agent that her son had left home the previous Friday, March 14, 1980, and gone to Miami to get a renewal of his passport and from there was going to fly to Colombia with his cousin. Mrs. Doggett was extremely cooperative with the agent, and even told him her son's departure flight number from Miami. Upon the agent's departure, Mrs. Doggett never told the petitioner of the agent's

visit, nor did she tell anyone in the family.

On March 18, 1980, Agent Driver issued a teletype to all United States Customs stations, EPIC and INTERPOL, stating that Marc Gilbert Doggett was wanted in connection with the indictment. These entries into these United States computers were cancelled six weeks later on May 2, 1980. Agent Driver testified that he did not request the cancellations and only "guessed" that the system had a standard procedure to cancel the entries out after a certain number of days.

On that same day, Agent Driver issued teletypes to the United States Customs stations, EPIC and INTERPOL stating that Mark Gilbert Doggett was wanted in connection with the indictment. Agent Driver did not

however, enter the petitioner's name into the National Crime Information Center computer, the primary law enforcement computer system, until April 2, 1981, over a year later. The agent testified that he did not enter the name until that date because he erroneously assumed that his prior teletypes got the petitioner into all law enforcement computer networks.

The next event in the chronology occurred in September, 1981, when Agent Driver learned that the petitioner had been arrested in Panama on a cocaine charge. Agent Driver contacted DEA Agent Williams, who at that time was the DEA agent in charge of Panama. Agent Driver testified that Agent Williams told him that he had made an informal request to the Panamanian Government to release the petitioner to the United

States. No written confirmation of this informal request for release or expulsion was produced in the record below. No request for extradition under the formal extradition treaty existing between the countries was ever invoked or utilized.

For the next three years, Agent Driver made periodic reports to his file on the state of the apprehension of the petitioner. In each DEA-6 report, the first of which was dated January 6, 1984, the second July 18, 1984, and the third March 10, 1985, Agent Driver erroneously reported that the petitioner was still in jail in Panama. The reports were based solely on Agent Driver's assumption that the petitioner was still in a Panamanian jail, and were not supported by any investigation conducted by the agent. The sole basis

for Agent Driver's belief that the petitioner was in Panama was his unsupported assumption that when American citizens are incarcerated in Panama, they generally serve lengthy sentences.

The petitioner's parents were notified by the State Department of his Panamanian incarceration. The petitioner's mother made one visit to him, and sent him money to help him survive the extreme conditions of the Panamanian jail. Further, the petitioner was regularly visited by personnel from the State Department of the United States in Panama.

In August 1985, Agent Driver was transferred to Panama, and learned that the petitioner had in fact been released in July, 1982. At this point, Agent Driver assumed that the petitioner knew

of the indictment, had left Panama for Colombia, and was still located in South America. This assumption was erroneous. Although the State Department in Panama knew of the release, the DEA, which was located only two blocks away from the State Department, did not know until August 1985.

Agent Driver never recontacted the petitioner's parents. The petitioner was never entered into FCIC, the Florida criminal history computer network, even though the indictment was issued in Florida. Agent Driver never performed a check of driver's license records. Nor did Agent Driver communicate to other agencies that the petitioner was under indictment. Agent Driver never performed a routine credit bureau check. Although Agent Driver had a belief that the petitioner had gone to Colombia, no

effort was ever conducted to extradite him from that country through the extradition treaty there.

By 1985, the DEA in Panama no longer even maintained a file on the petitioner, apparently due to the agency's policy of destroying inactive files. The United States Customs Office was not notified to watch for the petitioner as he entered the country; the only documentation that agency ever had regarding the petitioner was a secondary search request which had been cancelled in May, 1980. Agent Driver's efforts from 1981 onward consisted of periodic checks of the Jacksonville DEA file to see if the case was still active.

When Mr. Doggett was released from Panamanian captivity in July, 1982, he went to Colombia, staying briefly with an elderly aunt, teaching English

classes and recuperating from his weakened condition. On September 28, 1982, just three months after his release from the Panamanian jail, petitioner returned to the United States on his passport in his true name through customs at JFK Airport in New York, completely unaware of the indictment. He lived for the next few months in North Carolina at his grandmother's home. During that period, he met his wife and settled into the open, stable, and productive life he has led for the ensuing seven years. During that time, he lived under his true name and made no effort to conceal his identity or whereabouts.

The petitioner's arrest occurred as part of a program called WANT II, in which the Marshal's service made a check of all warrants and contacted the agency

responsible to see if the warrant had been served. WANT II commenced in September, 1988, and the petitioner was located by the Marshal's service through a credit bureau check within thirty minutes of commencing the search. Within minutes, the Government learned his driver's license number, the make and tag number of his vehicle, his wife's name, his employer, and his address.

The petitioner was arrested on September 5, 1988. He was arraigned September 20, 1988. On October 11, 1988, the he filed a Motion to Dismiss for Sixth Amendment Speedy Trial Violation. On October 24, 1988, the petitioner filed his Request for Production of Documents, seeking documents regarding the Government's efforts to locate the petitioner.

On December 14, 1988, the magistrate held a hearing on petitioner's Motion to Dismiss and on December 27, 1988, entered a Report and Recommendation recommending that the motion to dismiss be denied. [See Appendix A]. The petitioner filed timely Objections to the Magistrate's Report and Recommendation. On January 31, 1989, the district court entered its order denying the petitioner's motion to dismiss for speedy trial violation, and accepted the Magistrate's Report and Recommendation. [See Appendix B]. On February 3, 1989, the petitioner entered into a plea agreement reserving the right to appeal the dispositive issue of the speedy trial violation. At sentencing on March 31, 1989, the petitioner was sentenced to three years of probation and a $1,000 fine. A

timely Notice of Appeal was filed April 3, 1989 and an appeal taken pursuant to 28 U.S.C. §1291. The Court of Appeals for the Eleventh Circuit affirmed petitioner's conviction with one judge dissenting. A timely motion for rehearing was denied.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN BARKER v. WINGO, 407 U.S. 514 (1972); SMITH v. HOOEY, 393 U.S. 374 (1969); MOORE v. ARIZONA, 414 U.S. 25 (1973); AND UNITED STATES v. LOUD HAWK, 474 U.S. 302 (1986).

In Barker v. Wingo, 407 U.S. 514 (1972), this Court provided the framework for analysis of Sixth Amendment speedy trial violations. The Court provided four factors to be considered, among others, in determining

a Sixth Amendment constitutional violation:

> (1) The length of the delay;
> (2) The reason for the delay;
> (3) nature of the defendant's assertion of his right to a speedy trial; and
> (4) the prejudice caused to the defendant as a result of the delay.

Id. at 530-533. Since the four factors are to be balanced, this Court found, no single factor is dispositive. Id. at 533. In Moore v. Arizona, 414 U.S. 25 (1973), this Court held that an affirmative demonstration of prejudice to the accused was not essential to prove the denial of his constitutional right to speedy trial, prejudice to the accused being only one of the factors for consideration. Id. In its opinion below, however, the Eleventh Circuit in effect ignored this Court's opinions in Barker and Moore by holding that an affirmative showing of prejudice is

always required, even where the other three factors weigh in favor of or are neutral to the accused.

Further, in violation of the dictates of Smith v. Hooey, 393 U.S. 374 (1969), the Eleventh Circuit found a "deliberate" delay on the part of the Government (906 F.2d at 579), yet failed to apply this Court's requirement that the State "discharge its constitutional duty to make a diligent, good faith effort to bring [an accused to trial]." 393 U.S. at 383. The Eleventh Circuit thus ignored the constitutional impact of this deliberate delay, as required by this Court.

Finally, the Eleventh Circuit failed to properly allocate the burden of proof on the delay which it found to be presumptively prejudicial. 906 F.2d at 578. Although the court found that

the 8-1/2 year delay was "presumptively prejudicial," the court allocated to Mr. Doggett the burden of proving actual prejudice. The court stated:

> Doggett's assertion that the defendant does not bear the burden of establishing prejudice when the other three factors do not weigh heavily against the Government is erroneous. The Eleventh Circuit has consistently placed that burden on the defendant. See e.g., Rainstaff, 885 F.2d at [183] (defendant must "prove prejudice" unless three factors weigh heavily against Government then (Mitchell, 769 F.2d at 1548) (defendant "must show actual prejudice" unless three factors weigh heavily against Government); Dennard, 722 F.2d at 1513 (defendant must "demonstrate actual prejudice" unless three factors weigh heavily against Government).

Id. (citations omitted). This allocation of the burden of proof is not supported by this Court's Sixth Amendment analysis, and in fact, violates the dictates of Moore v. Arizona and Barker v. Wingo, in which

this Court clearly evinced its intent that no single factor be dispositive.

The Eleventh Circuit's opinion in this case, which is in accord with a line of Eleventh Circuit cases holding that the defendant must bear the burden of establishing prejudice when the other three factors do not weigh heavily against the Government, is contrary to this Court's precedent, as well as the Sixth Amendment right to speedy trial. This right essentially guarantees that where an accused person is never informed of the charge against him, the Government may not delay its efforts for any reason, for an indefinite and potentially infinite period, and still bring the charge against the accused unless he or she can prove actual prejudice to the defense of the case. This result obviously conflicts with

this Court's rule in Barker and Moore v. Arizona, as well as the intent of the Sixth Amendment right to speedy trial.

The dissenting opinion by Judge Clark states in part:

> I agree with the majority that Doggett cannot show any concrete examples of how he was prejudiced. Nevertheless, as Barker clearly holds, the showing is not "necessary" to make out a speedy trial clause violation. 407 U.S. at 533, 92 S.Ct. at 2193. The defendant cannot always show all of the prejudice he faces when the Government waits over eight years to bring him to trial. As Justice Powell noted in Barker:
>
> > There is also prejudice if defense witnesses are unable to recall accurately events of the faded past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. Id. at 532, 92 S.Ct. at 2193. This unprovable prejudice is one of the reasons why the majority mechanistic approach is inconsistent with the sixth amendment guarantee.
>
> 906 F.2d at 583.

With respect to the other factors set forth in Barker v. Wingo, Judge Clark noted:

> There are other circumstances in this case which should be taken into account in determining Doggett's entitlement to relief. Because Doggett did not know he was indicted until he was arrested in 1988, he could not assert his right to a speedy trial earlier. In this case, Doggett has been leading a "normal, productive, and law-abiding life" since his return to the United States. Id. at 577. It is reasonable to expect that after a certain point in time one will not have to answer for actions taken in the past. Generally, this protection is provided by the five-year statute of limitations in which "Congress has codified the policy that a person need not remain indefinitely in jeopardy for allegedly illegal acts." See United States v. Mitchell, 769 F.2d 1544, 1547 (11th Cir. 1985) (apply 18 U.S.C. §3282). While the fact that the defendant does not learn about the charges until after the limitations period has expired, does not automatically amount to a speedy trial violation, it is "another factor" that should be taken into account. Id. at 1547, 1548.
>
> Id.

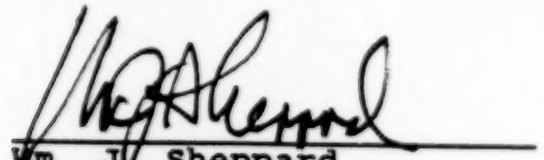
Rather than engaging in the "difficult and sensitive balancing process," described in Barker, the Eleventh Circuit applied a rigid rule, and foreclosed consideration of relevant factors present in this case. The Eleventh Circuit thus ignored long-standing principles laid down by this Court with respect to the analysis of speedy trial violations.

This Court should therefore grant certiorari to review and correct this misapplication of the Sixth Amendment constitutional dictates of this Court.

CONCLUSION

For the reasons given above, the petition for writ of certiorari should be granted.

Respectfully submitted,



Wm. J. Sheppard
215 Washington Street
Jacksonville, Fl. 32202
(904) 356-9661
COUNSEL FOR PETITIONER

(2)

90-857

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WM. J. SHEPPARD
ELIZABETH L. WHITE
SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, Fl. 32202
(904) 356-9661

ATTORNEYS FOR PETITIONER

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs. Case No. 80-11-Cr-J-16

MARC GILBERT DOGGETT, and
LUIS EDWARD ORTIZ-CRISTONCHO
_____/

REPORT AND RECOMMENDATION

I. STATUS

Defendants, Marc Gilbert Doggett, and Luis Edward Ortiz-Cristoncho, filed Motions to Dismiss with prejudice the indictment returned in this case on February 22, 1980. Both Defendants contend that their arrest in September 1988 and subsequent prosecution pursuant to the 1980 indictment violates their right to a speedy trial under the Sixth Amendment of the United States Constitution.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Special Agent Douglas R. Driver, with the Drug Enforcement Agency (DEA), worked undercover in a drug investigation from November 1979 - January 1980. Agent Douglas testified before the Grand Jury regarding the results of his investigation on February 22, 1980, when an indictment listing multiple defendants was returned and sealed.

Agent Driver testified that the defendants were located in different geographical areas and wanted them arrested simultaneously.[1] In an effort to accomplish this goal and other objectives, on February 22, 1980, a memorandum from the office of the United

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[1] Agent Driver testified that many of the major defendants were outside of the United States and attempts were being made to lure them into the United States.

States Attorney was sent to the United States Marshal directing them to refrain from making arrests under the indictment because DEA would be making the arrests. Agent Driver testified that he believed it generally was a nationwide policy (unwritten) for DEA to make the initial attempt to arrest individuals that they had investigated to protect potential evidence, the safety of the U.S. Marshals, and to prevent duplicated efforts.

FACTS SURROUNDING THE SEARCH AND WHEREABOUTS OF MARC GILBERT DOGGETT

Agent Driver testified that on March 19, 1980, efforts were made to arrest Doggett in Raleigh, North Carolina. Agent Driver testified that he learned from his telephone conversations with the two agents who attempted to arrest Doggett (Charles

Overton, with the North Carolina State Bureau of Investigations, and Officer Larry Rawlins, Wake County Alcohol Beverage Control), that they went to the residence of the parents of Doggett and talked with his mother. See exhibit #2. Agent Driver testified that the two agents told Doggett's mother about the arrest warrant to which she responded by telling them that her son had left four days earlier to go to Colombia to purchase cocaine and that she hoped that he would get arrested to get him out of that business. She also advised the agents that she would notify them if he came home.[2]

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[2] This testimony was corroborated by Defendant's mother, Leonor Doggett Pinzon. However, she denied telling the agents that her son had gone to Colombia to purchase cocaine. She testified that she did not know her son was involved in (Footnote Continued)

On March 18, 1980, pursuant to this information, Agent Driver had Doggett entered into the text computer which would alert all United States Customs Stations that Doggett was wanted pursuant to an arrest warrant. See exhibit #1. However, unknown to Agent Driver, Doggett was subsequently taken off the text computer on May 2, 1980. See exhibit F. Agent Driver testified that he did not request that the information be taken off the text computer and only guessed that they had a standard procedure to cancel them out of the text computer after a certain number of days.

(Footnote Continued)
cocaine and told the agents that her son had gone to Colombia with his cousin William Doggett to purchase emeralds and for spring vacation. She also testified that she supplied the agents with her son's flight number and told them he
(Footnote Continued)

Agent Driver testified that he filled out a fugitive declaration form (see exhibit A) on March 18, 1981, concerning Doggett which caused him to be placed into the National Crime Information Center computer (NCIC)[3] on April 2, 1981. See exhibit #4. Agent Driver testified that the submission of the fugitive declaration form routinely will cause the individual to be placed into the DEA, text (customs), and NCIC computers. Agent Driver testified that his failure to have Doggett entered into NCIC sooner was caused by his erroneous assumption that Doggett would also be entered into NCIC and all other relevant

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(Footnote Continued)
would be applying for a passport in Miami.

[3] NCIC alerts law enforcement officers if someone they have arrested is wanted in another jurisdiction who
(Footnote Continued)

computers when he was put into text on March 18, 1980. Agent Driver testified that he immediately corrected the problem when it came to his attention.

Agent Driver testified that on September 21, 1981, he received either a teletype or telephone call from Agent Leonard Williams, the DEA agent in charge of operations in Panama, informing him that Doggett had been arrested on drug charges by Panamanian authorities. Agent Driver testified that he requested Agent Williams to initiate proceedings with Panamanian officials to have Doggett expelled to the United States for trial.[4] Agent Driver testified that Agent Williams

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(Footnote Continued)
has entered that person's identification into NCIC.

[4] Agent Driver testified that (Footnote Continued)

submitted a written request for Doggett's expulsion on September 21, 1981; and subsequently on October 15, 1981, Agent Williams received a response from the Attorney General's office in Panama concurring in his request for Doggett's expulsion. See exhibit #5 (Agent William's "DEA-6", a case report). Agent Driver testified that Agent Williams had told him that expulsion has worked in previous occasions. Agent Driver testified that no attempts were made to formally extradite Doggett.

Agent Driver testified that Agent Williams left Panama in July 1982.

(Footnote Continued)
expulsion is an informal arrangement between the United States and Panama, where Colonel Noriega determines the United States fugitive is undesirable and orders the individual to be turned over to the appropriate United States authorities.

Agent Driver testified that he never did communicate with Agent William's successor concerning the status of Doggett. Agent Driver testified that he just assumed that Doggett received a 10 - 15 year sentence and would serve it. Agent Driver testified that American citizens usually serve longer sentences than Panamanian citizens.

The record reflects that on January 6, 1984, Agent Driver submitted a "DEA-6" stating that Doggett was presently in custody in Panama and that Panamanian authorities have been requested to expel him to the United States to stand trial. See exhibit B. The record also reflects that Agent Driver made similar case reports on July 18, 1984, and March 10, 1985, containing the same information. See exhibits C and D. Agent Driver testified that he

based these reports on information he had previously received from Agent Williams when he was stationed in Panama.

In August 1985, Agent Driver was transferred to Panama. Agent Driver testified that one of the first things he did was check with Panama enforcement authorities who thought Doggett had already been released. Agent Driver testified that he learned of papers that were found on Doggett when he was arrested by Panama officials which indicated that he had been living in Bogota, Colombia. Agent Driver testified that he just assumed that Doggett went back to Colombia when he was released from custody in Panama to avoid his arrest in the United States.

A document faxed from the State Department consulate in Panama indicates

that Doggett was released on July 15, 1982, by order of the Sixth District Court of Panama and that Doggett informed the consulate that he planned to return to Colombia.[5] See exhibit #10. There is no evidence that this information was ever forwarded to anyone at DEA.

Agent Driver testified that Agent Williams had explained to him that explusion was the only procedure used to return a fugitive from Panama while he was stationed there. Consistent with this information, Agent Driver testified that subsequent to his arrival in Panama in August 1985, he was told by various

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[5] Exhibit E establishes that Doggett was admitted into the country by U.S. Customs at JFK airport in N.Y.C. on 9/25/82. Agent Driver testified that because of the large number of people entering the United States each day, (Footnote Continued)

embassy personal that there was no provision for the formal extradition of a United States citizen for drug offenses in the treaty between the United States and Panama and that the appropriate procedure was through expulsion. Agent Driver also testified that shortly before he left Panama in February 1987, in his efforts to return fugitive Jack Reed, a defendant in **United States v. Ledher**, 81-82-Cr-J-12, he was told that Reed would be the first fugitive to be extradited pursuant to a recent extradition treaty that had just been signed. However, Agent Driver testified that Panamanians chose not to extradite Reed and had him expelled as previously done in other cases.

(Footnote Continued)
U.S. Customs only randomly runs people through NCIC.

Leonor Doggett Pinzon, the Defendant's mother, testified that no law enforcement officers contacted her regarding the whereabouts of her son subsequent to the initial contact on March 18, 1980. She testified that she did not tell anyone about the arrest warrant. She stated that she did not want to worry her husband so she did not tell him. She testified that she visited her son in jail in Panama but did not tell him about the indictment because she did not want him to worry and wanted him to come back to the United States. She testified that she did not see her son in the United States until somewhere around 1983 - 1984 when he arrived at their home with his wife. She testified that she still did not tell him anything about the indictment

because she thought the statute of limitations had run.

Dolores Doggett, Defendant's wife, testified that she met him in Pittsburgh, Pennsylvania in October 1982. She testified that Doggett was living with his grandmother in Brown Summit, North Carolina. She testified that they moved to Reston, Virginia, and subsequently got married on October 22, 1983. She testified that Marc Doggett interacted openly and freely in the community using his true name. (i.e., they financed through the bank two houses; he obtained his associate degree at college; was a registered voter in 1984 and 1988; had credit cards; filed income taxes since 1983 (exhibit G); was employed; obtained a Virginia driver's license; had obtained three traffic

tickets for moving violations; and had a passport (exhibit Q)).

FACTS SURROUNDING SEARCH AND WHEREABOUTS OF EDWARD ORTIZ-CRISTONCHO

Agent Driver testified that no attempt was made to arrest Ortiz because he had reason to believe that Ortiz was out of the country. Agent Driver testified that in November 1979 he negotiated for 50 kilograms of cocaine with Ortiz and "kingpin Fabio Moreno" in Nassau. Agent Driver testified that after the two of them left he obtained registration information from the hotel they were staying in which revealed Ortiz's full name, street address in Bogota, Colombia, and a passport number which further inquiry revealed it to be a Colombian passport number.

Agent Driver testified that at the time there was no treaty with Colombia allowing extradition and that he could not send anyone to arrest him. Agent Driver testified that in January 1980, he talked with Colombia officials who stated that they had no provision to allow the arrest of Colombian citizens. Agent Driver stated that he was aware that subsequently a treaty for extradition with Colombia was established, but that he did not apply for one. Agent Driver testified that extradition is never granted by the Colombian authorities.

Agent Driver testified that Ortiz was entered into NCIC on May 24, 1980. See exhibit 3. Agent Driver testified that he did not know Ortiz's date of birth and that his attempt to discover it had failed. However, as testified to

by Ralph D. Carr, Inspector Deputy United States Marshal, to be entered into NCIC the date of birth is a prerequisite. Agent Driver testified that since he did not know Ortiz's date of birth, he estimated that Ortiz was the same age as Moreno (6/8/47) and used this date of birth just to get Ortiz into the computer.

Defendant Ortiz testified that he was born in Bogota, Colombia on September 26, 1950. He testified that he traveled to Miami on a passport, applied for a green card in August 1980, and received in on May 20, 1981. Ortiz testified that he originally lived with his inlaws in North Miami Beach, 500 N.W. 179th Street, since February 1980. Ortiz testified that he subsequently remarried and had a daughter born to him on July 16, 1980. See exhibit H. The

record reveals on May 19, 1981, Ortiz requested a search of the Miami Police Department files revealing a misdemeanor arrest. See exhibit I. Ortiz testified that he had filed income taxes with his wife since 1983, which reveal his present address at 5900 S.W. 127th Avenue, Apartment 3405, Miami, Florida. See exhibit N. Ortiz also had a visa card (exhibit K), social security card (since 1980), automobile (exhibit L), Florida drivers license (exhibit O), and received a loan in his name (exhibit M).

Ortiz testified that he has a criminal record. Ortiz testified that he was arrested in Miami, Florida, in May 1983, for possession of a firearm with a silencer and subsequently incarcerated for two months. Ortiz also testified that on September 9, 1987, he was arrested in Miami by the Federal

Bureau of Investigations (FBI) on drug trafficking charges arising out of Los Angeles, California. Ortiz was incarcerated four months in Miami awaiting extradition, and subsequently incarcerated an additional four months in California. Ortiz pled guilty to the charges on August 18, 1987, and subsequently served time.

ARREST OF DOGGETT AND ORTIZ IN SEPTEMBER 1988

Inspector Carr testified that he received an arrest warrant from the Clerk's office regarding the defendants on February 22, 1980. He testified that the U.S. Marshal's Office did not make an active search for Doggett or Ortiz. Inspector Carr testified that the U.S. Marshal's primary responsibilities were escape warrants, material witness

warrants, failure to appear warrants, and parole warrants.

Inspector Carr testified that the U.S. Marshal's Office did not start looking for Doggett or Ortiz until September 1988, when a program called WANT II (warrant apprehension narcotic teams) was implemented on the Gulf coast. The U.S. Marshals service set up in strategic areas from Miami to Texas looking for both state and federal narcotic fugitives.[6]

Inspector Carr testified that he located Doggett by running a credit check which he followed with a driver

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[6] Inspector Carr testified that the U.S. Marshals covering a span from Texas to Miami were assigned approximately 8,000 fugitive cases in WANT II, which resulted in 420 cases being cleared and 225 people being arrested. WANT II ceased approximately five weeks ago.

license check.[7] From these checks he learned where Doggett lived, worked, his wife's name, and the make and tag number of his vehicle. Doggett was subsequently arrested by the U.S. Marshal in Virginia on September 5, 1988.

Inspector Carr testified that he located Ortiz by searching for his criminal history in either NCIC or FCIC

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[7] Inspector Carr testified that the U.S. Marshals service does not use credit checks routinely but rather as a last resort. Similarly, Agent Driver testified that it was not practical to make routine credit checks, and had not proved successful in the past. In addition, Agent Driver testified that he did not make a driver license check on Doggett because he believed he was out of the United States avoiding his arrest and that he does not have the time to make routine checks for driver licenses. Moreover, Agent Driver testified that Jerry Smith from NCIC headquarters in Washington, D.C., discouraged routine checks of driver licenses.

(Florida Crime Information Center)[8] and learned of the arrest in Miami and the subsequent transfer to California. Inspector Carr testified that he contacted the probation officer in California and learned that his probation had been transferred to Miami and was given his Miami address. Ortiz was arrested by U.S. Marshals on September 3, 1988.

DUE PROCESS VS. SPEEDY TRIAL

The protection of the Sixth Amendment is activated by "either a formal indictment or information or else the actual restraints imposed by arrest

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[8] Inspector Carr testified that FCIC has "soundex" which allows the computer to pick up names in a search that have similar spelling and similar birth dates. In contrast with NCIC, if one letter is different in the name or

(Footnote Continued)

and holding to answer a criminal charge...." **United States v. Marion**, 404 U.S. 307, 320-21 (1971); **Dillingham v. United States**, 423 U.S. 64, 65 (1975). However, the United States argues that in a post-indictment case where the Defendant asserts no knowledge of the indictment, the delay issue would more appropriately be argued under a Fifth Amendment due process analysis as could be suggested under **United States v. MacDonald**, 456 U.S. 1 (1982).

> The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by the statutes of limitations. The speedy-trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser but nevertheless substantial, impairment of liberty imposed on an accused while released

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(Footnote Continued)
the birth date is incorrect, the individual will not be retrieved.

> on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

Id. at 8. More support for this argument can be found in **United States v. Loud Hawk**, 474 U.S. 302 (1985), where the Supreme Court stated: "...when defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weigh the time towards a claim under the Speedy Trial Clause. **Id.** at 312.

This Court has failed to locate any cases where this issue has been directly addressed. Even though prejudice to the defense is not the primary concern of the speedy trial clause, it is not irrelevant. **Barker v. Wingo**, 407 U.S. 514, 532 (1972). In three cases all involving a defendant who asserted no knowledge of the indictment until

arrest, the court applied the **Barker** balancing test in determining whether the delay violated their Sixth Amendment right to a speedy trial. **United States v. Dennard**, 722 F.2d 1510, 1513 (11th Cir. 1984); **United States v. Williams**, 782 F.2d 1462, 1466 (9th Cir. 1986); **United States v. Denson**, 668 F.Supp. 1531, 1534 (S.D. Fl. 1987).

Accordingly, this Court finds that the indictment returned against the Defendants on February 22, 1980, activated the right to a speedy trial. The Court shall now consider under the standard enumerated in **Barker** discussed below whether the delay occasioned in their apprehension violated their Sixth Amendment right to a speedy trial.

RIGHT TO A SPEEDY TRIAL

Under the Sixth Amendment of the United States Constitution, all criminal defendants have a right to a speedy trial. The right to a speedy trial has been described as "amorphous", "slippery", and "generically different" from any other right guaranteed by the Constitution. **Barker**, 407 U.S. at 519, 522. It is almost impossible to say with any precision exactly when a particular defendant's speedy trial right has been violated. **See id.** at 521-22.

Barker v. Wingo, supra, was the Supreme Court's first attempt to develop a criteria to evaluate whether delays in bringing a criminal defendant to trial violate the Sixth Amendment guarantee. In **Barker**, the court enumerated the following four factors which should be

considered in determining whether a criminal defendant has been denied this Sixth Amendment right: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. 407 U.S. at 530. However, no one of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right," and the courts still must engage in a sensitive balancing process whereby the conduct of both the prosecution and the defendant. are weighed. **Id.** at 530.

(1) Length of the Delay - Doggett and Ortiz

The first **Barker** factor, length of delay, "defines a threshold in the inquiry: there must be a delay long enough to be 'presumptively prejudicial'". **Loud Hawk**, 474 U.S. at

314 (quoting **Barker**, 407 U.S. at 531-32). However, "the length of the delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." **Barker**, 407 U.S. at 530-31. The United States has conceded that the delay of over eight years between the indictment and the arrest of both Defendants was "presumptively prejudicial" and warrants an inquiry into the other three **Barker** factors.

(2)(A) Reason for the Delay - Doggett

Whenever an individual has been officially accused of a crime, the government has "constitutional duty to make a diligent good-faith effort" in attempting to locate and apprehend the accused. **Smith v. Hooey**, 393 U.S. 374, 383 (1969); **United States v. Blanco**, No. 85-1423, slip op. at -- (2d Cir.

November 10, 1988); **United States v. Diacolios**, 837 F.2d 79, 82 (2d Cir. 1988); **United States v. Bagga**, 782 F.2d 1541, 1543 (11th Cir. 1986). Doggett asserts that there are basically four time periods during which the government failed to make a "diligent good-faith effort" to locate and apprehend him. Doggett has listed these time periods as: (1) the time period between the return of the indictment of February 22, 1980, and his departure to Colombia on March 14, 1980; (2) the time period during his incarceration in Panama; (3) his lawful entry into the United States on September 25, 1982; and (4) the following time period up until his arrest which he lived openly under his true name.

(2)(A)(1) February 22, 1980 - March 18, 1980

Doggett argues that there was almost a one month period after the indictment was returned that his arrest could have been executed at his parents residence before he left Colombia. Doggett alleges that no rational answer has been suggested to support such a delay. However, the record is contrary to Doggett's assertion. The indictment returned listed multiple defendants. Agent Driver testified the defendants were located in different geographical areas and that he wanted to arrest them simultaneously. He also testified that many of the major defendants were located outside of the United States and attempts were being made to lure them into the United States. Clearly, the government may justifiably delay

arresting Doggett one month when the arrest may cause co-defendants to flee. **United States v. Blanco, supra.** Moreover, Agent Driver testified that Doggett was residing in North Carolina and that it takes time to contact the out of state law enforcement officials and coordinate the arrest.

Accordingly, the court cannot find that the government was either negligent or failed to exercise due diligence in attempting to arrest Doggett on March 18, 1980, pursuant to the indictment returned on February 22, 1980.

(2)(A)(2) Incarceration in Panama, ? - July 25, 1982[9]

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[9] No evidence has been submitted establishing the date Doggett was taken into Panamanian custody. However, DEA learned of Doggett's incarceration in Panama on September 21, 1981.

Secondly, Doggett contends that the government did not exercise due diligence by failing to extradite him pursuant to the treaty with Panama. Doggett argues under the authority of **Bagga, supra**, that his "absence from the country did not relieve the government of its obligations to make good-faith efforts to have him returned." 782 F.2d at 1543. Agent Driver testified that he was unaware that United States fugitives with narcotic charges could be formally extradited pursuant to the treaty with Panama. Agent Driver testified that Agent Williams who was in charge of the DEA office in Panama up until July 1982, told him that expulsion was the procedure used and had worked in the past. Agent Driver also testified that Agent Williams made a written request for the expulsion of Doggett.

Accordingly, the Court finds that expulsion procedures were in fact initiated and sufficed as a "good faith effort" to have Doggett returned to the United States to face the pending charges.

(2)(A)(3) & (4) July 25, 1982 - September 5, 1988

Finally, Doggett alleges that the facts surrounding the government's failure to arrest him upon his reentry into the United States and the government's subsequent failure to arrest him while he was living openly in the United States clearly illustrates the lack of diligence in their efforts to apprehend him. The testimony indicates that the government's failure to apprehend Doggett immediately upon his release from Panamanian custody on July 15, 1982, was the result of a

breakdown in communication between government agencies. The Panamanian authorities had been notified and concurred in the request for the expulsion of Doggett. Doggett was released the same month Agent Williams left Panama who requested the expulsion. There presently is no indication that Agent Williams received any notice of Doggett's release. However, the record does reflect that the State Department in Panama received notice of Doggett's release. The court can only speculate that the information was transmitted to the DEA office in Panama and was lost somewhere in the change of command or never made it there for some unknown

reason.[10] Obviously, the failure to apprehend Doggett upon his release from Panamanian custody could be attributed to nothing more than "bureaucratic negligence". See **United States v. Greene**, 578 F.2d 648, 655 (5th Cir.

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[10] The Court does not have sufficient facts to establish whether or not the DEA's failure to discover Doggett's release was the direct result of the State Department or its own negligence. This raises an interesting question as to whether or not the negligence of another agency can be attributed to the law enforcement agency seeking the apprehension of the fugitive. Valid arguments could be made for each side. It could be argued that although the delay did not emanate from direct action by the law enforcement officers, it should be nonetheless chargeable to the government because it results from a breakdown in the system that inevitably results in delay. On the other hand, it could be argued that errors made by helping agencies should not be chargeable if there was a reasonable good faith belief the helping agency was conducting a proper investigation. Otherwise, the agency responsible for the search would be held accountable to conduct every conceivable type of nationwide hunt.

1978), **cert. denied**, 439 U.S. 1133 (1979); **United States v. Palmer**, 537 F.2d 1287, 1288 (5th Cir. 1976), **cert. denied**, 434 U.S. 1018 (1978) (bureaucratic negligence is a neutral reason and should be weighed less heavily than deliberate delay).

Doggett was not arrested by customs upon his reentry into the United States because he was taken off the text computer on May 2, 1980. Agent Driver testified that he was unaware that Doggett had been removed from the text computer and only guessed that procedurally customs removes names after a certain number of days. Doggett also was not picked up on NCIC because customs only randomly makes checks because of the large number of people that daily come through customs.

Agent Driver testified that he did not make a search for Doggett in the United States subsequent to his release from Panamanian custody because he just assumed that Doggett went back to Colombia to avoid charges that were pending in the United States. This assumption is not irrational taking into consideration that Agent Driver was aware that Doggett's mother had been informed of her son's charges pending in the United States and that Agent Driver was cognizant that Doggett was residing in Colombia prior to his arrest by Panamanian authorities. Moreover, it would not be unreasonable for Agent Driver to assume that Doggett would be arrested by U.S. Customs if he attempted to reenter the United States because he testified that he was not aware that

Doggett had been removed from the "text" (customs) computer.

In **Barker**, the Court distinguished between a deliberate attempt to delay the trial in order to hamper the defense, which would be weighed heavily against the government, and a "more neutral reason" such as negligence or overcrowded courts which would be weighed less heavily against the government. 407 U.S. at 531. In **Bagga**, the court elaborated stated that "a more neutral reason, such as negligence, does not necessarily tip the scale in favor of the defendant, particularly where the defendant was at liberty and outside the jurisdiction where the indictment was returned." 782 F.2d at 1544 (quoting **United States v. Walters**, 591 F.2d 1195, 1201 (5th Cir.), **reh'g. denied**, 549 F.2d 863 **cert. denied**, 442 U.S. 945 (1979)

and citing **United States v. Carter**, 603 F.2d 1204, 1207 (5th Cir. 1979)). See also **Dennard**, 722 F.2d at 1513; **United States v. Saintil**, 705 F.2d 415, 418 (11th Cir.), **cert. denied**, 464 U.S. 855 (1983); **United States v. Greer**, 655 F.2d 51, 53 (5th Cir. 1981; **United States v. Avalos**, 541 F.2d 1100, 1113 (5th Cir. 1976).

In conclusion, the delay between Doggett's release from Panamanian custody on July 15, 1982, and his subsequent arrest on September 5, 1987, clearly is attributable to the negligence of the government. However, Doggett does not make any allegation that the government's failure to apprehend him was purposeful or done to obtain a "tactical advantage", a practice clearly condemned by the Supreme Court which could warrant the

severe remedy of dismissal. See **Barker**, 407 U.S. at 531. Although the court does not condone DEA's failure to apprehend Doggett at an earlier date, it recognizes the problems caused by large case loads, the reality of making practical decisions regarding efforts to implement available search techniques in each case assigned to the agent, and the added problem that Doggett left the boundaries of the United States for over two years. The Court would hope for perfection, but recognizes fallibility.

Accordingly, while the ultimate responsibility for delay subsequent to July 25, 1982, must rest with the government and not the Defendant, because the delay was the result of negligence and was not intentionally done for tactical reasons, the Court must weigh the reason against the

government although less heavily than were it to have been deliberate. **Barker**, 407 U.S. at 531 (negligence a "neutral" reason).

(3)(A) Defendant's Assertion of his Right to Speedy Trial - Doggett

The third **Barker** factor to be considered is the defendant's assertion of his right to a speedy trial. In **Barker** the Supreme Court rejected any kind of a rigid demand-waiver rule whereby a defendant's failure to demand a trial would constitute a **de facto** waiver of the speedy trial right. **Id.** at 524-28. The Supreme Court reasoned that waiver is defined as "an intentional relinquishment or abandonment of a known right or privilege." **Id.** at 525. Under the demand-waiver doctrine a fundamental right is lost through a silent record.

Nevertheless, the Supreme Court recognized that although failure to assert the right does not act as a waiver, such failure will make it difficult for a defendant to assert his right successfully at some later point in time. **Id.** at 531-32. The Supreme Court stated that such assertions from defendants are "entitled to strong evidentiary weight" in determining whether their rights to a speedy trial have been denied. **Id.** at 531-32. "The more serious the deprivation the more likely a defendant is to complain." **Id.** at 531.

There is no evidence suggesting that Doggett even knew that drug trafficking charges were pending in the United States against him until he was arrested September 5, 1988. Doggett's mother testified that she never told him

or anyone else about the charges and Doggett's wife testified that she was not aware of the charges. Doggett failed to take the stand and testify. While clearly the Defendant's assertion of his right is an important factor in determining whether his speedy trial right was violated, Doggett had no reason to do so if we assume he was unaware of the pending charges.

Accordingly, Doggett's failure to assert his right to a speedy trial shall not be weighed against him. See **Dennard**, 722 F.2d at 1513 (court held that the defendant's failure to assert her speedy trial rights did "not inure to [her] benefit" when she was unaware of the indictment until arrest); **Williams**, 782 F.2d at 1466 (defendant's failure to assert his right to a speedy trial not weighed against defendant when

he was unaware of the indictment). However, the Court notes Doggett's failure to assert his right to a speedy trial until after his arrest reveals that little personal discomfort was occasioned by the delay.

(4)(A) Prejudice to the Defendant - Doggett

The fourth and final **Barker** factor to be considered is whether the defendant has suffered any prejudice resulting from the delay. This fourth factor must be assessed in light of the certain interests which the speedy trial right was designed to protect. The Supreme Court has identified the following three interests: (1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation, and (3)

to limit the possibility that long delay will impair the ability of an accused to defend himself. **United States v. Ewell**, 383 U.S. 116, 120 (1965); **Barker**, 407 U.S. at 532. The Supreme Court has referred to the third interest, prejudice to the defense, as the most serious one because the inability of a defendant to adequately prepare his case shows the unfairness of the entire system upon which he is prosecuted.[11] **Barker**, 407 U.S. at 532.

Although establishing prejudice is not a prerequisite to finding a Sixth Amendment violation, **see Moore v. Arizona**, 414 U.S. 25, 26 (1973), the Eleventh Circuit has been reluctant to

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[11] Subsequent cases have given the third interest less importance in the consideration of the defendant's speedy trial right. **McDonald**, 456 U.S. at 8; **Loud Hawk**, 474 U.S. at 312.

find a speedy trial violation in the absence of genuine prejudice. **Ringstaff v. Howard**, No. 87-7573, slip op. at 542 (11th Cir. Dec. 8, 1988); **United States v. Mitchell**, 769 F.2d 1544, 1547 (11th Cir. 1985), **cert. denied**, 474 U.S. at 1066 (1986); **Dennard**, 722 F.2d at 1513-14; **Avalos**, 541 F.2d at 116-17; (unless the other three **Barker** factors all weigh heavily against the government, defendants must demonstrate actual prejudice). See also **United States v. Martinez**, 776 F.2d 1481, 1483 (10th Cir. 1985) **United States v. Jenkins**, 701 F.2d 850, 857-58 (10th Cir. 1983).

Since the second and third factor of the **Barker** test do not **weigh heavily** against the government, Doggett must establish "actual prejudice". The record clearly indicates that the

Defendant did not suffer any prejudice under the first two interests sought to be protected under the speedy trial right. Doggett was never subjected to pretrial incarceration due to this indictment. Furthermore, Doggett's liberty was not restricted by the indictment nor could he claim to have suffered any anxiety over the more than eight year wait for his arrest pursuant to the indictment since he contends he lived openly and freely within the United States and testimony indicates that he was not aware of its existence.

Under the third interest, Doggett alleges the more than eight year delay has prejudiced his defense by faded memories; lost tape recorded telephone conversations which may have been exculpatory; a missing confidential

informant; and his loss of eligibility for youthful offender status.

The first three allegations are conclusory and unpersuasive to make out a speedy trial violation. The mere possibility of absence or loss of memory of witnesses have been consistently held insufficient.[12] **See Loud Hawk**, 474 U.S. at 315; **Blanco**, **supra**, slip op. at --; **Dennard**, 722 F.2d at 1513-14; **United States v. Greene** 578 F.2d at 648; 656 (5th Cir. 1978), **cert. denied**, 439 U.S.

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12 The potential missing witness is a confidential informant for the DEA now known to be Ivan Cifuentes. Whether Cifuentes will be available for trial is speculative at this point in time. Agent Driver testified that the last time he spoke with Cifuentes was in the summer of 1988 in California. Cifuentes has withdrawn from the witness protection program and efforts to contact him since September 1988 have proven unsuccessful. Agent Driver stated that Cifuentes periodically maintains contact and he believed that they could find him.

1133 (1979); **United States v. Edwards**, 577 F.2d 883, 889 (5th Cir.), **cert. denied**, 439 U.S. at 968 (1978); **Avalos**, 541 F.2d at 1116. The unsubstantiated assertion that the missing tapes "may be exculpatory" equally requires the Court to speculate and is insufficient. **See United States v. Golden**, 436 F.2d 941 (6th Cir.) (claimed impairment of defense because of delay must be specific and not be mere conjecture), **cert. denied**, 404 U.S. 910 (1971). Faded memories, missing witnesses, and lost tape recordings is a "two way sword" because it is very likely that it may disadvantage the government far more than the accused because the government carries the burden of proof. **See Loud Hawk**, 474 U.S. at 315.

Doggett's fourth assertion that he suffered prejudice by the delay since he

is no longer eligible for the Youth Correction Act, which Congress abolished in 1984, is also invalid. Doggett would only have been eligible for the Young Adult Offender Act, 18 U.S.C. §4216, which applied only to those who had not obtained their 25th birthday by the time of their conviction. Since Doggett was born June 11, 1956, his eligibility for the Act ended June 10, 1982, prior to his September 25, 1982, return to the United States. Since the delay was due to Doggett's absence from the country and was not the fault of the government, the asserted prejudice is not present.

Accordingly, neither the specific types of prejudice mentioned in **Barker** nor any others have been established by Doggett. The passage of time alone, without a significant deprivation of liberty or impairment of the ability to

defend, is not conclusive evidence of prejudice. The Court holds that no prejudice can be found in the record.

(5)(A) Conclusion - Doggett

Doggett has failed to establish any demonstrable prejudice that he has suffered from the delay in his apprehension. He has not suffered any pretrial incarceration due to this indictment nor has his liberty been restricted by the indictment. Doggett is precluded from arguing that he experienced any anxiety as a result of the charges since he argues he was not aware of the indictment until the arrest. The government made a diligent good faith effort to locate Doggett however it was spoiled through its own negligence. The government's failure to locate Doggett was not part of any scheme to prejudice his defenses and

thus is weighted less heavily against them.

Accordingly, after careful consideration of all the factors outlined in **Barker**, this Court concludes that Doggett's right to a speedy trial has not been violated under the circumstances.

(2)(B) Reason for the Delay - Ortiz

Ortiz contends that the reason for the delay was caused by the government's failure to make a diligent search for his apprehension. Ortiz asserts that if any effort would have been made, he would have been found as illustrated by the U.S. Marshal's efforts who apprehended him within 48 hours of being given the task. Ortiz contends that the government's NCIC entry by itself was insufficient to constitute a diligent search.

However, the entry of Ortiz into NCIC by Agent Driver under the circumstances without hindsight constituted a diligent good faith effort to apprehend Ortiz. Agent Driver's investigation had revealed Ortiz's full name, an address in Bogota, Colombia, and a Colombian passport number. Agent Driver testified that he had visited Colombia in January 1980, and talked with Colombian officials about Ortiz, but could not obtain any further information about him. Agent Driver did not make further efforts to search for Ortiz in the United States under the reasonable belief that he was not living within the United States. As testified to by Agent Driver, it is not practical to make routine driver license checks or credit checks, especially when you believe they are not living within the

country. A "diligent good-faith effort" does not require the government to exhaust all conceivable avenues. **Bagga**, 782 F.2d at 1541.

The Court notes that Ortiz's entry into NCIC did not prove productive simply because the system requires exact spellings of name and the exact birth date. Agent Driver attempted to obtain Ortiz's birth date to no avail and substituted it with Fabio Moreno's just so he could get him entered into the system. Thus, Ortiz was not picked up on NCIC when he was arrested in 1983 and 1987 because the computer did not have his correct birth date.

Accordingly, the Court concludes that Agent Driver's efforts to gain information regarding Colombian authorities regarding Ortiz and the entry of Ortiz into NCIC was sufficient

to constitute under the circumstances a diligent good faith effort to apprehend Ortiz. The reason for delay shall not be weighted against the government.

(3)(B) Defendant's Assertion of his Right to Speedy Trial - Ortiz

There is no evidence suggesting Ortiz was aware of the outstanding drug trafficking charges, but equally so there was no evidence introduced that he was not aware of the charges. Ortiz failed to testify one way or the other. As already stated, such assertions from defendants are "entitled to strong evidentiary weight" in determining whether their rights to a speedy trial have been denied. **Barker**, 407 U.S. at 531-32. "The more serious the deprivation the more likely a defendant is to complain." **Id.** at 531.

Accordingly, Ortiz' failure to request a speedy trial during the more than eight years of the outstanding indictment does not inure to his benefit.

(4)(B) Prejudice to the Defendant - Ortiz

As already stated, when the first three **Barker** factors weigh heavily against the government, the defendant need not demonstrate actual prejudice. **Ringstaff, supra; Dennard, supra.** A careful review of the equities involved clearly reveals that Ortiz has failed to demonstrate that the second and third **Barker** factors **weigh heavily** against the government. Therefore, Ortiz is required to establish actual prejudice resulting from the delay.

Ortiz has failed to demonstrate that he suffered any prejudice as the

result of the delay by the government in making his apprehension. Ortiz was not subjected to pretrial incarceration due to this indictment and his assertion that he has lived openly and freely over the past eight years clearly establishes that neither his liberty has been abridged by the outstanding indictment nor has he suffered any anxiety.

Ortiz has also made conclusory assertions that the delay will prejudice his defense. Ortiz contends that it is now impossible for him to prepare an alibi defense to the charges and that the missing tapes may be exculpatory. However, the legitimacy of Ortiz's alibi is very questionable. Ortiz has failed to provide the Court with a scintilla of evidence about the alibi, such as the names of the missing witnesses that he asserts could corroborate his alibi as

asserted in his Motion, or exactly what the alibi is. Also, the Court has already rejected the similar unsubstantiated assertion by Doggett that the missing tapes "may be exculpatory". The courts have consistently held that defendants are required to articulate with more specificity allegations of prejudice when trying to establish a violation of their speedy trial right. See Loud Hawk, supra; Blanco, supra; Dennard, supra; Avalos, supra.

The Court also does not find any merit in Ortiz's assertion that if he would have been arrested in a timely fashion he would have gone to trial without a criminal record. Although Ortiz may now be disadvantaged at trial by his criminal record, the Court cannot find that Ortiz's post indictment

criminal activity should be attributed against the government and used to Ortiz's advantage to claim prejudice and a violation of his speedy trial rights.

In sum, Ortiz has failed to demonstrate any prejudice as a result of the delay in his apprehension.

(5)(A) Conclusion - Ortiz

Under the circumstances, the Court finds that the government made a diligent good faith effort to apprehend Ortiz. The record is entirely void as to whether Ortiz knew about the indictment prior to his arrest. Ortiz's failure to assert his right to a speedy trial does not benefit him in the balancing. Ortiz has failed to demonstrate any prejudice as result of the delay by the federal government in obtaining his apprehension. Ortiz was not subjected to pretrial incarceration,

nor was there any showing that Ortiz suffered from any anxiety.

Accordingly, the Court rejects Ortiz's claim that his right to a speedy trial has been violated.

III. RECOMMENDATION[13]

The Motions to Dismiss be DENIED.

DONE AND ENTERED at Jacksonville, Florida, this 27th day of December, 1988.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
United States Magistrate

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13 Any party may file and serve objections hereto within ten (10) days after service of this opinion. Failure to do so shall bar the party from a de novo determination by a district judge of an issue covered herein and from attacking factual findings on appeal. See 28 U.S.C. §636; **Thomas v. Arn**, 106 S.Ct. 466 (1986); **Nettles v. Wainwright**, 677 F.2d 404 (en banc) (5th Cir. Unit B, 1982); and Local Rule 6.02.

Copies to:

The Honorable John H. Moore, II
United States District Judge

United States Attorney (Morris)

William J. Sheppard, Esquire
215 Washington Street
Jacksonville, Florida 32202

Stephen A. Glass, Esquire
330 Biscayne Boulevard
Penthouse Suite
Miami, Florida 33132

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v. Case No. 80-11-Cr-J-16

LUIS EDWARDO ORTIZ-CRISTONCHO
MARC GILBERT DOGGETT

ORDER

The above-styled cause is before the Court on the Report and Recommendation of the United States Magistrate, filed herein on December 27, 1988. Defendant, MARC GILBERT DOGGETT, filed objections to the Report and Recommendation on January 6, 1989, and the Government filed its response thereto on January 17, 1989. Defendant, LUIS EDWARDO ORTIZ-CRISTONCHO, did not file any objections to the Report and Recommendation.

After conducting a de novo review of the entire record herein, the Court

hereby adopts, confirms and ratifies the Report and Recommendation. Accordingly, it is now

ORDERED AND ADJUDGED:

That the defendants' motions to dismiss the indictment for violation of the sixth amendment right to a speedy trial are hereby DENIED.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 31 day of January, 1989.

/s/ John H. Moore
UNITED STATES DISTRICT JUDGE

Copies to:

U.S. Attorney (Morris)
William Sheppard, Esq.
Stephen A. Glass, Esq.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-3298

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Marc Gilbert DOGGETT,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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July 19, 1990

Before KRAVITCH and CLARK, Circuit Judges, and ATKINS*, Senior District Judge.

KRAVTICH, Circuit Judge:

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Marc Doggett appeals his conviction on one count of conspiracy to import cocaine entered pursuant to a conditional plea agreement. Doggett contends that the eight and a half year delay between his indictment and arrest violated his sixth amendment right to a speedy trial.[1] The district court adopted the recommendation of a magistrate that found no violation. We affirm.

STATEMENT OF FACTS

Marc Doggett was indicted on February 22, 1980, for conspiring to import cocaine in violation of 21 U.S.C. §963 and conspiracy to distribute

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[1] The Speedy Trial Clause of the Sixth Amendment states: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...."

cocaine in violation of 21 U.S.C. §846. A warrant for Doggett's arrest was issued the same day. In order to make simultaneous arrests of several individuals involved in the conspiracy, Douglas Driver, the Drug Enforcement Administration (DEA) agent who conducted the investigation of Doggett notified the United States Marshal's Service that the DEA would coordinate Doggett's arrest. It is uncontested that Doggett did not know as this or any other time prior to his arrest in 1988 that he had been indicted or that a warrant for his arrest had issued.

On March 18, 1980, agent Driver instructed two law enforcement officers to arrest Doggett at his parents' home. Doggett's mother informed them that her son had left for Bogota, Colombia four days earlier. Driver entered a notation

in the Treasury Enforcement Communication System (TECS),[2] alerting all U.S. Customs stations that Doggett was wanted pursuant to an arrest warrant. Driver also sent a teletype to all of the United States Customs stations, the El Paso Intelligence Center (EPIC),[3] and INTERPOL stating that Doggett was wanted by the DEA pursuant to an arrest warrant issued in Florida. The teletype provided a description of Doggett, the name of his travelling companion, Doggett's flight information relating to his trip to

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[2] TECS is the computer system used by customs agents to screen individuals entering the United States at Airports and border crossings.

[3] EPIC coordinates intelligence gathering operations for various federal law enforcement agencies, including the Marshals Service, DEA, and the Customs Service.

Colombia, and agent Driver's contact number. Driver did not place Doggett on the National Crime Information Center (NCIC)[4] computer system because he erroneously believed that the TECS notation and EPIC teletype would suffice to enter Doggett onto the system. Driver's TECS notation, unbeknownst to him, expired in September 1980 and was deleted from the system. On March 18, 1981, Driver realized that Doggett had not been placed on th NCIC computer and completed a fugitive declaration form which accomplished that purpose.

On September 21, 1981, Driver was informed by agent Williams, the official in charge of DEA operations in Panama, that Doggett had been arrested on drug

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[4] The NCIC system alerts police if someone they have arrested is wanted in another jurisdiction.

charges by the Panamanian authorities. Driver requested Williams to initiate information expulsion proceedings, but made no attempts to extradite Doggett formally. Driver testified that he did not try to initiate extradition proceedings because he was told by law enforcement officials in the United States Embassy in Panama that the extradition treaty between the United States and Panama did not cover drug offenses. Additionally, Driver testified that explusion proceedings had succeeded both before and after their attempted use on Doggett in expelling wanted individuals to the United States. On October 15, 1981, Williams received a letter for the attorney general of Panama agreeing to expel Doggett to the United States once the Panamanian prosecution was completed. Williams

left Panama in July 1982 and reported to Driver that Doggett was still in Panamanian custody.

On July 15, 1982, however, Doggett was released by Panamanian authorities. Several cables from the United States embassy in Panama to the Department of State in Washington, D.C., indicate that the United States was notified both of Doggett's release and of his plans to return to Colombia. Doggett proceeded to Colombia where he lived with his aunt for nearly three months. On September 25, 1982, Doggett returned to the United States and was admitted by United States Customs at John F. Kennedy Airport in New York City.

From 1982 to 1985 Agent Driver continued to believe that Doggett was being held by the Panamanian authorities. During this period, Driver

filed three DEA-6 status forms stating that Doggett was in custody in Panama and that a request for explusion had been made. Driver testified that it was his understanding that American citizens serving time in Panamanian prisons for drug offenses usually were not released for five or ten years. Therefore, he assumed that Doggett had received a lengthy sentence from the Panamanians, and did not communicate with Williams's successor concerning Doggett's status. Driver did not discover that Doggett had already been released until he was transferred to Panama in August 1985.

Nevertheless, Driver made no specific effort to locate Doggett after 1985 because he believed that the defendant was living in Colombia. Driver knew that Doggett had been living in Colombia before he came to Panama and

had obtained documents from Panamanian law enforcement officials indicating that Doggett had an address in Bogota, Colombia, and that he was using his mother's maiden name as an alias. Driver testified that he did not attempt a fifty state driver's license or credit search because he did not believe the defendant was in the United States, the defendant had a history of using other names, and such investigative techniques were nearly always unsuccessful.

In September 1988, pursuant to WANT II,[5] a Marshals' office program that checks all outstanding warrants to see if they have been served, a credit check was made on Doggett. Within thirty

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[5] WANT II was a special narcotic fugitive apprehension program targeting roughly 8,000 individuals with outstanding warrants. The program resulted in 225 arrests out of 8,000 cases.

minutes the government discovered Doggett's driver's license number, the make and tag of his car, his wife's name, his employer and his address. Doggett was arrested on September 5, and arraigned on September 20, 1988.

It is undisputed that from the time Doggett returned to the United States to the present, he has led a normal, productive, and law-abiding life. He met his wife in October 1982 and married a year later. Doggett interacted openly and freely in the community using his real name and making no attempt to conceal his identity or whereabouts. He financed two houses, through the bank, possessed credit cards, was a registered voter, filed income tax returns, obtained a driver's license, was issued three traffic tickets, obtained his associate degree at college, and was

employed as a computer operations manager.

DISCUSSION

The facts in this case are essentially undisputed. The point of contention is the magistrate's application of the Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), sixth amendment speedy trial analysis to the facts.[6] The trial court's legal conclusion that Doggett

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6 We initially note our agreement with the magistrate's determination that the indictment returned against Doggett on February 22, 1980, activated his sixth amendment right to a speedy trial even though he had no knowledge of the indictment until he was arrested. This result is compelled by the Supreme Court's holding that "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the (Footnote Continued)

failed to establish a violation of his constitutional right to a speedy trial is reviewable de novo. The factual findings underpinning this legal conclusion are reviewed for clear error. Mitchell, 769 F.2d at 1547; see United States v. Bagga, 782 F.2d 1541, 1544-45 (11th Cir. 1986).

In Barker, the Court enumerated four factors that should be considered in assessing the assertion of a speedy trial violation. These factors are

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(Footnote Continued)
Sixth Amendment." Dillingham v. United States, 423 U.S. 64, 65, 96 S.Ct. 303, 303, 46 L.Ed.2d 205 (1975); United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971); see United States v. Loud Hawk, 474 U.S. 302, 310-12, 106 S.Ct. 648, 653-54, 88 L.Ed.2d 640 (1986); see, e.g., United States v. Mitchell, 769 F.2d 1544, 1546-47 (11th Cir. 1985), cert. denied, 474 U.S. 1066, 106 S.Ct. 819, 88 L.Ed.2d 792 (1986) (calculating delay for speedy trial purposes from time indictment returned even though defendant did not know of indictment).

(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. Barker, 407 U.S. at 530-32, 92 S.Ct. at 2192-93; see Loud Hawk, 474 U.S. at 313-14, 106 S.Ct. at 655; Ringstaff v. Howard, 885 F.2d 1542, 1543 (11th Cir. 1989) (en banc). These factors must be carefully balanced because none of them is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Barker, 407 U.S. at 533, 92 S.Ct. at 2193, Mitchell, 769 F.2d at 1546; United States v. Dennard, 722 F.2d 1510, 1512 (11th Cir. 1984).

The Eleventh Circuit, en banc, recently revisited the speedy trial issue in Ringstaff v. Howard, 885 F.2d 1542 (11th Cir. 1989). The court

interpreted Barker as requiring the length of the delay to be "presumptively prejudicial" in order to trigger an inquiry into the other three factors. Id. at 1543; see Loud Hawk, 474 U.S. at 314, 106 S.Ct. at 655. The court noted that absent bad faith or a deliberate effort to hamper the defense, a defendant is required to show actual prejudice in order to prevail. Ringstaff, 885 F.2d at 1545. The defendant need not show actual prejudice, however, if the other three factors weigh heavily against the prosecution. Id. at 1543.

The government concedes that the eight and a half year delay is presumptively prejudicial, warranting an inquiry into the other three factors. The magistrate found that the other three factors did not weigh against the

government sufficiently to dispense with the requirement of actual prejudice. The magistrate subsequently found that the defendant had failed to show actual prejudice and therefore concluded that his right to a speedy trial had not been violated. The district court adopted the magistrate's recommendation. the following analysis will address each of the Barker factors seriatim.

Length of Delay

This factor clearly weighs heavily in favor of the defendant. In Barker, the Supreme Court described a five year delay as "extraordinary." 407 U.S. at 533, 92 S.Ct. at 2193-94. Likewise, in Ringstaff, the Eleventh Circuit found a twenty-three month delay to be presumptively prejudicial. 885 F.2d at 1543; cf. Bagga, 782 F.2d at 1542

(thirty-six month delay presumptively prejudicial); Dennard, 722 F.2d at 1513 (fifteen month delay presumptively prejudicial). The government has conceded that the length of the delay is presumptively prejudicial.

Reason for the Delay

Once an individual has been indicted, the government has a constitutional duty to make a diligent good-faith effort to locate, apprehend, and bring to trial the accused. Bagga, 782 F.2d at 1543; see Smith v. Hooey, 393 U.S. 374, 383, 89 S.Ct. 575, 579, 21 L.Ed.2d 607 (1969). This duty persists even when the accused is out of the country. Bagga, 782 F.2d at 1543. Thus, when the government acts negligently in seeking and apprehending the accused, the reason for the delay

should be weighed against the government. Barker, 407 U.S. at 531, 92 S.Ct. at 2192; Dennard, 722 F.2d at 1513; see Bagga, 782 F.2d at 1544; United States v. Carter, 603 F.2d 1204, 1207 (5th Cir. 1979);[7] United States v. Greene, 578 F.2d 648, 655 (5th Cir. 1978); cert. denied, 439 U.S. 1133, 99 S.Ct. 1056, 59 L.Ed.2d 96 (1979), United States v. Palmer, 537 F.2d 1287, 1288 (5th Cir. 1976), cert. denied, 434 U.S. 1018, 98 S.Ct. 738, 54 L.Ed.2d 764 (1978).

In order for this factor to be weighed heavily against the government, however, the trial delay must result from bad faith or a dilatory purpose

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[7] The Eleventh Circuit, in the en banc decision Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent
(Footnote Continued)

by the government. Ringstaff, 885 F.2d at 1544; see Loud Hawk, 474 U.S. at 315-16 , 106 S.Ct. at 656; Barker, 407 U.S. at 531, 92 S.Ct. at 2192; Carter, 603 F.2d at 1207; Palmer, 537 F.2d at 1288. Bad faith encompasses a deliberate effort to prejudice or harass the defendant, while a dilatory purpose will include efforts made by the government to gain a tactical advantage over the accused. See Loud Hawk, 474 U.S. at 315, 106 S.Ct. at 656; Barker, 407 U.S. at 531, 92 S.Ct. at 2192; Marion, 404 U.S. at 325, 92 S.Ct. at 466; Ringstaff, 885 F.2d at 1544; Bagga, 782 F.2d at 1544.

The court below appropriately weighed this factor against the government rather than the defendant,

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(Footnote Continued)
decisions of the former Fifth Circuit rendered prior to October 1, 1981.

because the delay in arresting Doggett is better attributed to the government's negligent law enforcement efforts than the conduct of the defendant. Agent Driver erred in allowing the TECS notation to lapse in September 1980 and in failing to place Doggett on the NCIC computer system until March 1981.[8] Additionally, the government, through

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[8] It bears noting that neither of these errors was particularly significant in contributing to the delay in arresting the defendant. Agent Driver entered the TECS notation immediately after the agents failed to arrest Doggett at his parent's home. Although this notation expired while Doggett was incarcerated in Panama, the NCIC entry was in place when Doggett reentered the country in September 1982. This notation would have alerted customs officials at JFK airport that there was an outstanding warrant for the defendant's arrest. The customs officers at JFK, however, are only able to conduct random NCIC checks due to the
(Footnote Continued)

the negligence of either the DEA or the State Department, erred in failing to notify the appropriate law enforcement personnel that Doggett was returning to the United States.[9] As a result, Doggett was not apprehended upon entering the United States and agent

(Footnote Continued)
great number of individuals entering the country. The failure of these officials to conduct a check of Doggett is unfortunate, but not negligent. See United States v. Deleon, 710 F.2d 1218, 1221 (7th Cir. 1983).

[9] Doggett's suggestion that the government acted negligently in failing to extradite him while he was incarcerated in Panama is without merit. The DEA acted within its discretion in determining that informal expulsion proceedings would be a more effective means of bringing Doggett to trial in the United States than formal extradition. The magistrate received ample evidence that the expulsion process had succeeded previously and that extradition, in practice, was an impracticable means of seeking the release of wanted individuals from Panamanian jails. The failure of the Panamanian authorities to expel Doggett
(Footnote Continued)

Driver did not know that Doggett had been released from the Panamanian prison until August 1985. Finally, agent Driver acted negligently in failing to pursue Doggett in the United States because he erroneously assumed that Doggett was living in Colombia. Driver did not attempt to verify that Doggett was in Colombia and did not make any effort to locate Doggett in the United States in the event that his assumption concerning Doggett's whereabouts was incorrect. In fact, had Driver periodically sought verification from the State Department that Doggett was still being held by the Panamanian authorities, he would have realized that Doggett had left the country well before August 1985.

(Footnote Continued)
after they had agreed to do so, cannot be imputed to the United States.

Because the government's efforts to apprehend Doggett were negligent and there is no persuasive evidence that Doggett purposefully tried to evade capture, the reason for delay must be weighed against the government. There is no contention here that the government deliberately delayed apprehending Doggett.[10] Doggett does not allege that the government purposefully sought to prejudice, harass, or gain any other advantage over

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[10] Doggett does argue that the twenty-six day gap between his indictment and the first attempt to arrest him constitutes a deliberate breach of the government's duty to make a diligent, good faith effort to bring an accused to trial. Although the delay was deliberate, its length was insufficient to implicate speedy trial concerns and it was not motivated by a desire to gain an advantage over the accused. The court below did not clearly err in finding that the delay was necessary to facilitate the arrest
(Footnote Continued)

him by delaying the arrest. Indeed, there is no reason to believe that the government would not have immediately seized the opportunity to arrest Doggett had they succeeded in locating him sooner. Although a showing of deliberate delay is not necessary for an individual to establish a constitutional speedy trial violation if he demonstrates actual prejudice, it is a necessary prerequisite to weighing the reason for the delay heavily against the government.

Defendant's Assertion of Right

The magistrate determined that Doggett's failure to assert his right to a speedy trial soon after his indictment should not be weighed against him

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(Footnote Continued)
of Doggett's codefendants and to coordinate the out-of-state arrest.

because he was unaware of the pending charges. Doggett contends that his assertion of the right as soon as he became aware of the charges, following his 1988 arrest, requires this factor to be weighed heavily against the government. The magistrate's position is correct and supported by the precedent of this circuit.

In United States v. Mitchell, the defendants failed to assert their speedy trial right before their arrest because a sealed indictment prevented them from knowing of the impending charges. 769 F.2d at 1546. The Eleventh Circuit, applying the Baker analysis, affirmed the district court's refusal to weigh the defendants' assertion of the right after arrest in their benefit. Id. at 1547. Likewise, in United States v. Dennard, this court refused to weigh the

assertion of the right factor against the government when the defendant did not know of the indictment until after her arrest. 722 F.2d at 1513.

These results are consistent with the Supreme Court's review of a defendant's assertion of the right as a measure of the point at which the deprivations occasioned by the trial delay begin to outweigh the benefits to the defendant. The Court describes the function of this factor stating:

> The strength of [a defendant's] ... efforts [to assert his speedy trial right] will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain.

Barker, 407 U.S. at 531, 92 S.Ct. at 2192. A defendant's late assertion of

the right, regardless of the reason, is properly accorded less weight than an early assertion of the right because the reason that contributed to the delay generally has a concomitant effect of lessening the severity of the deprivation experienced by the defendant from the trial delay. Here, for instance, Doggett's ignorance of the indictment and delayed arrest explain his failure to assert the right sooner, but also protected him from suffering the mental anguish associated with being accused of criminal activity and the physical restraints on his liberty that may have been occasioned by an early arrest.[11]

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[11] Concededly, the speedy trial right protects other interests, such as the societal desire to bring alleged criminals quickly to trial and a (Footnote Continued)

Although Doggett's failure to assert his right to a speedy trial soon after his indictment will not inure to his benefit, it will not be weighed against him because he did not know of the indictment until he was arrested. The magistrate, therefore, correctly weighed Doggett's assertion of the right as a neutral factor in the Barker analysis.

Prejudice to the Defendant

In Ringstaff, the Eleventh Circuit held that a "defendant does not have to

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(Footnote Continued)
defendant's ability to present an unimpaired defense. Barker, 407 U.S. at 519-20, 532, 92 S.Ct. at 2186-87, 2193. Both of these interests are addressed by other factors in the Baker analysis. Furthermore, as with the other three factors, a defendant's failure to establish an early assertion of the right is not dispositive of his claim of a speedy trial violation. Id., 407 U.S. at 533, 92 S.Ct. at 2193.

show actual prejudice by delay ... if the first three [Barker] factors weigh heavily against the Government." 885 F.2d at 1543; see Mitchell, 769 F.2d at 1547; Dennard, 722 F.2d at 1513. Here, only the length of the delay weighs heavily against the government; therefore, an inquiry into the prejudice suffered by the defendant as a result of the delay is mandated.

The fact that the other two factors did not weigh heavily against the government, however, does not make them irrelevant to the speedy trial analysis. The Supreme Court has stated that the four factors

> are related ... and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Barker, 407 U.S. at 533, 92 S.Ct. at 2193; see Mitchell, 769 F.2d at 1546; Dennard, 722 F.2d at 1512. Therefore, in assessing prejudice it is important to consider the strength of the showing the defendant made on the other three factors. Where, as here, two of the factors weigh against the government and none of the factors favor the government, the defendant's showing of prejudice need not be as strong as if the majority of the factors had weighed against the defendant.[12]

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[12] Doggett's assertion that the defendant does not bear the burden of establishing prejudice when the other three factors do not weigh heavily against the government is erroneous. The Eleventh Circuit has consistently placed that burden on the defendant. See, e.g., Ringstaff, 885 F.2d at [183] (defendant must "prove prejudice" unless three factors weigh heavily against

(Footnote Continued)

In addition to considering the first three Barker factors in evaluating prejudice, a court should also weigh the three central policies underlying the right to a speedy trial; the prevention of undue and oppressive incarceration prior to trial; the minimization of anxiety and concern accompanying public accusation; and the prevention of injury to the accused's ability to defend himself. Loud Hawk, 474 U.S. at 312, 106 S.Ct. at 654; Barker, 407 U.S. at 532, 92 S.Ct. at 2193; Ringstaff, 885 F.2d at 1545. The first two policies underlying the right to a speedy trial are not implicated in this case. Doggett

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(Footnote Continued)
government); Mitchell, 769 F.2d at 1548 (defendant "must show actual prejudice" unless three factors weigh heavily against government); Dennard, 722 F.2d at 1513 (defendant must "demonstrate actual prejudice" unless three factors weigh heavily against government).

was never subject to pretrial incarceration and could not have suffered any "anxiety and concern" relating to his indictment until he first learned of it in September, 1988.

Doggett alleges that his ability to defend himself was impaired by the trial delay because he can no longer be sentenced under the lenient Young Adult Offender statute due to his age and the repeal of the act. See United States v. Black, 416 F.Supp. 59, 62 (M.D. Fla. 1976) (loss of Young Adult Offender status constitutes prejudice). Even if we recognized the loss of Young Adult Offender status as an adequate basis for establishing prejudice, the magistrate correctly found that Doggett failed to show his entitlement to the Act's protection. Doggett's eligibility

for the Act ended on June 10, 1982, on the eve of his twenty sixth birthday. See 18 U.S.C. §4216. From shortly after his indictment to his twenty sixth birthday, Doggett was absent from the United States due to a combination of his voluntary travel abroad and his incarceration in Panama for drug smuggling. Therefore, any prejudice resulting from a loss of this favored status is directly attributable to the conduct of the defendant rather than any action of the government. In fact, during this period, the government had procured an agreement to expel Doggett from Panama and was waiting for the Panamanian authorities to carry out their promise.

The defendant also argues that he was prejudiced by the loss of tape recordings of conversations with DEA

agents. He contends that the loss deprived him of potentially exculpatory evidence and of his ability to confront these witnesses with their prior statements. The magistrate properly rejected this ground as too speculative. Absent some proof that the destroyed evidence was exculpatory or that the evidence was destroyed in bad faith, we are unable to find that its absence impaired Doggett's defense. Cf. Arizona v. Youngblood, 488 U.S. 51, ___, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988); Marion, 404 U.S. at 325-26, 92 S.Ct. at 466; Redman v. Dugger, 866 F.2d 387, 389-90 (11th Cir. 1989).

Furthermore, in Mitchell, we rejected a similar assertion of prejudice based on the destruction of taped conversations because, in part, we agree with the district court that

"there were other means and methods of producing that evidence by those present who heard the tape." 782 F.2d at 1544. Here, the individuals who appeared on the tape (Driver, the informant, Doggett, and his codefendants) were all available to testify as to the conversations recorded. Since the government carries the burden of proof in a prosecution, the loss of the tapes is far more likely to have prejudiced the government's ability to convict Doggett than impaired Doggett's inability to defend himself. See Arizona v. Youngblood, 488 U.S. at ___, 109 S.Ct. at 338 (Stevens, J., concurring); Loud Hawk, 474 U.S. at 315; 106 S.Ct. at 656. Doggett's remaining allegations of prejudice are speculative and meritless. The lower court's finding that Doggett failed to make an

adequate showing of prejudice is, therefore, not clearly erroneous.

CONCLUSION

Doggett has failed to establish a violation of his constitutional right to a speedy trial because he cannot show either that the first three Barker factors weigh heavily in his favor or actual prejudice. The judgment of the district court, is therefore, AFFIRMED.

CLARK, Circuit Judge, dissenting:

After conceding that none of the four factors relevant to a speedy trial claim favor the government, and two of the factors are in Doggett's favor, the majority denies his sixth amendment speedy trial claim because he cannot show prejudice. Because I think that the majority's approach is inconsistent

with the requirements of Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), I dissent.

After setting out the four factors applied by the majority, the Barker Court explained how a court should consider these factors:

> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right....
>
> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

407 U.S. at 533, 92 S.Ct. at 2193 (footnote omitted) (emphasis added). The majority ignores this directive and denies the claim because Doggett cannot show prejudice. The majority abdicates its responsibility to "engage in [the] difficult and sensitive balancing process." Id. The four factors in this case "should be considered together with [the] other circumstances [that are] relevant" to Doggett's claim. When this balancing is done fairly and equitably, Doggett is entitled to relief.

As noted above, there are two Barker factors favoring the defendant. The first is the length of the delay. As the majority notes, the five-year delay in Barker was characterized as "extraordinary." Slip Op. at 3839, at ___. The delay in this case was eight and one-half years. In Bell v. Lynaugh,

828 F.2d 1085, 1094 (5th Cir. 1987), the court characterized an eight-year delay as "unwarranted and presumptively prejudicial." Similarly, in Garcia Montalvo v. United States, 862 F.2d 425, 426 (2d Cir. 1988), the court noted that "eight years is an inordinate amount of time in which to bring an indicted person to trial." I would place great weight on this factor in conducting the Barker balancing.

As the majority concedes, the government's only justification for this inordinate delay is that it was not guilty of "bad faith or a dilatory purpose." Slip Op. at 3849, at ___. According to the majority, the government was merely "negligent." The majority correctly recounts the government "attempts" to capture Doggett. It is evident on its face that

the government did not capture Doggett because he was not worth the effort. He was a small fish in the ocean of those involved in the drug trade. Given that the government missed many opportunities to apprehend Doggett, I would consider its conduct in this case grossly negligent and would weigh this factor heavily against the government.[13]

I agree with the majority that Doggett cannot show any concrete examples of how he was prejudiced.

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13 I do not mean to suggest that the government has to leave no stone upturned when attempting to apprehend those accused of relatively minor crimes. I realize that the government must deploy its law enforcement resources where they will be the most effective. Nevertheless, because criminal defendants are entitled by the constitution to a speedy trial, the government should not be allowed to use negligence to justify an eight-year delay when it has missed several opportunities to apprehend a criminal defendant.

Nevertheless, as Barker clearly holds, this showing is not "necessary" to make out a speedy trial clause violation. 407 U.S. at 533, 92 S.Ct. at 2193. The defendant cannot always show all of the prejudice he faces when the government waits over eight years to bring him to trial. As Justice Powell notes in Barker:

> There is also prejudice if defense witnesses are unable to recall accurately events of the faded past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

Id. at 532, 92 S.Ct. at 2193. This unprovable prejudice is one of the reasons why the majority's mechanistic approach is inconsistent with the sixth amendment guarantee.

There are other circumstances in this case which should be taken into account in determining Doggett's

entitlement to relief. Because Doggett did not know he was indicted until he was arrested in 1988, he could not assert his right to a speedy trial earlier. In this case, Doggett has been leading "a normal, productive, and law-abiding life" since his return to the United States. Slip Op. at 3838, at ___. It is reasonable to expect that after a certain point in time one will not have to answer for actions taken in the past. Generally, this protection is provided by the five-year statute of limitations in which "Congress has codified the policy that a person need not remain indefinitely in jeopardy for allegedly illegal acts." See Mitchell, 769 F.2d at 1547 (applying 18 U.S.C. §3282). While the fact that the defendant does not learn about the charges until after the limitations

period has expired does not automatically amount to a speedy trial violation, it is "another factor" that should be taken into account. Id. at 1547, 1548.

After balancing these factors, even after taking into account the Supreme Court's caution against an "overzealous application" of the "extreme remedy of dismissal," Barker, 407 U.S. at 522 & n. 16, 92 S.Ct. at 2188 & n. 16, Doggett was entitled to a dismissal of the charges against him. That society's interest in trying Doggett is insignificant is evident by the government's weak attempts to apprehend him. I would reverse.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-3298

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARC GILBERT DOGGETT,

Defendant-Appellant.

On Appeal from the United States
District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion July 19, 1990, 11th Cir., 198__, _____F.2d _____).

(Sep 12 1990)

Before: KRAVTICH and CLARK, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in Regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit

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* Hon. C. Clyde Atkins, Senior U.S. District Judge for the Southern (Footnote Continued)

Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

(Footnote Continued)
District of Florida, sitting by designation.

Supreme Court, U.S.
FILED
FEB 1 1991
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-857

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARC GILBERT DOGGETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the delay between the return of the indictment and petitioner's arrest violated his Sixth Amendment right to a speedy trial.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 64-105) is reported at 906 F.2d 573. The order of the district court (Pet. App. 62-63) adopting the report and recommendation of the magistrate (Pet. App. 1-61) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1990. A petition for rehearing was denied on September 12, 1990. Pet. App. 106-108. The petition for a writ of certiorari was filed on Novem-

ber 30, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 22, 1980, petitioner was indicted in the United States District Court for the Middle District of Florida on charges of conspiracy to import cocaine (Count 1) and conspiracy to possess cocaine with intent to distribute it (Count 2), in violation of 21 U.S.C. 963 and 846. Following petitioner's arrest on September 5, 1988, he moved to dismiss the indictment for an alleged violation of his constitutional right to a speedy trial. After that motion was denied, petitioner entered a conditional guilty plea to Count 1. Imposition of sentence was suspended in favor of three years' probation, and petitioner was fined $1,000. The court of appeals affirmed.

1. The circumstances surrounding the passage of eight years between the return of the indictment and petitioner's arrest were developed at a pretrial hearing on petitioner's motion to dismiss. The evidence showed that in late 1979, petitioner and Allen Lee Riddle were using flight attendants to import cocaine from Fabio Moreno in Colombia. DEA Agent Douglas Driver negotiated the purchase of 40 kilograms of cocaine from Moreno. Moreno sent Agent Driver to petitioner in Raleigh, North Carolina, to obtain a sample of the cocaine. On November 24, 1979, petitioner gave Driver 5.7 grams of cocaine and $6,800 in cash and told him to give the cash to Moreno in Colombia. Thereafter, Agent Driver assisted the Colombian police in seizing 40 kilograms of cocaine and arresting nine persons in Colombia. The officers were not, however, able to arrest Moreno. Gov't C.A. Br. 4-5.

Petitioner and seven others were indicted on charges stemming from the aborted importation on February 22, 1980. On March 18, 1980, two North Carolina officers went to the home of petitioner's parents in Raleigh.[1] His mother told the officer that petitioner had left four days earlier for Colombia to get cocaine, and she agreed to notify the agents if he came home. Agent Driver entered petitioner's name in the Treasury Enforcement Communication System (TECS), and he alerted all United States Customs stations and INTERPOL. Without Driver's knowledge or permission, however, petitioner's name was deleted from the TECS computer several months later. The following year, Agent Driver completed a fugitive declaration form for the purpose of entering petitioner's name in the National Crime Information Center (NCIC) computer system, after discovering that his entries into the other systems had not automatically resulted in the entry of petitioner's name in the NCIC system as well. Gov't C.A. Br. 5-6; Pet. App. 4-5, 67-68.

In October 1981, Agent Driver learned that petitioner had been arrested the previous month in Panama for importing cocaine into that country. At Agent Driver's instance, a DEA representative in Panama made a formal request to have petitioner expelled to the United States at the conclusion of the proceedings in Panama. On October 15, 1981, the

---

[1] Two of petitioner's co-defendants were arrested that day and tried and convicted the following September. *United States* v. *Barnes*, 681 F.2d 717 (11th Cir. 1982). The government did not attempt to arrest any of the defendants between February 22 and March 18, 1980, because it was trying to lure some of the foreign defendants into the United States in order to accomplish a simultaneous arrest of as many of the defendants as possible. Gov't C.A. Br. 5.

DEA office in Panama received a letter from the Attorney General of Panama agreeing to that request.[2] Agent Driver thereafter assumed that petitioner was serving a sentence in Panama, and he heard nothing more about petitioner until 1985, when Agent Driver was transferred to Panama. Upon arriving in Panama, Agent Driver checked on petitioner's status and learned that he had been released but could not be located. Agent Driver investigated further and learned from the State Department that petitioner had been released to return to Colombia in July 1982. Agent Driver made no further attempt at that time to locate petitioner, because he believed petitioner was living in Colombia and assumed that petitioner would be apprehended if he tried to enter the United States. Gov't C.A. Br. 6-8; Pet. App. 8-12, 68-72.

According to petitioner's passport, he returned to the United States on September 25, 1982. His mother saw him one year later and chose not to tell him about the outstanding charges. Petitioner moved to Reston, Virginia, in October 1983. In September 1988, the United States Marshals began searching for approximately 8,000 fugitives as part of a special narcotics fugitive apprehension program. Using a credit checking machine, they found petitioner's Reston address and arrested him on September 4, 1988. Gov't C.A. Br. 8-9; Pet. App. 11 n.5, 19-21, 72-74.

Despite the passage of eight years, petitioner's codefendants, Agent Driver, and the government informant were available to testify at trial. However, 17 tape recordings made during the investigation had

[2] This expulsion procedure had worked in other cases, both before and after petitioner's arrest in Panama. Gov't C.A. Br. 7.

been lost and were not available for use as evidence against petitioner. Gov't C.A. Br. 10; Pet. App. 95-97.

2. Following an evidentiary hearing, the magistrate recommended to the district court that it deny petitioner's motion to dismiss the indictment. Pet. App. 1-61. The magistrate applied the four-part test established in *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972), and found no constitutional speedy trial violation.

The magistrate agreed that the eight-year delay between indictment and arrest was "presumptively prejudicial" and warranted an inquiry into the remaining factors. Pet. App. 27-28. Analyzing those factors, the magistrate found that the government had made a good faith effort to obtain custody of petitioner following his arrest in Panama by initiating the expulsion process and that the failure to arrest petitioner after his release in Panama was attributable to "nothing more than 'bureaucratic negligence.'" *Id.* at 35. The magistrate further concluded that once Agent Driver learned that petitioner had traveled from Panama to Colombia, he reasonably assumed that petitioner intended to remain outside the United States in order to avoid apprehension. Moreover, because Agent Driver did not know that petitioner's name had been removed from the TECS computer, the magistrate believed Agent Driver was justified in assuming that petitioner would be arrested by the Customs Service if he attempted to reenter the United States. *Id.* at 37-38. Because the magistrate concluded that the delay was "not intentionally done for tactical reasons," but was instead the result of negligence, he weighed the cause of the delay against the government less heavily than

if the delay had been deliberate. *Id.* at 40-41. The magistrate did not weigh petitioner's failure to assert his right to a speedy trial against him, because there was no evidence that petitioner knew about the charges. *Id.* at 44-45. Finally, the magistrate found that petitioner suffered no prejudice as a result of the delay, in the form of anxiety, pretrial detention, or actual impairment to his defense. *Id.* at 46-51. After weighing all the factors, the magistrate determined that petitioner's right to a speedy trial had not been violated. *Id.* at 52.

The district court reviewed the record de novo, adopted the report and recommendation of the magistrate, and denied the motion to dismiss the indictment. Pet. App. 62-63.

3. The court of appeals affirmed. Pet. App. 64-105. Like the district court, the court of appeals found that the length of the delay rendered the delay presumptively prejudicial and that the government had an obligation to make a diligent, good-faith effort to locate and apprehend petitioner. *Id.* at 78-79. But because the government was, at worst, negligent in its efforts to locate petitioner and did not act in bad faith or with a dilatory purpose, the court did not weigh that factor heavily against the government. *Id.* at 80-86. The court next found that petitioner's failure to assert his right to a speedy trial was a neutral factor, since he was not aware of the outstanding charges. *Id.* at 89-90. Because two of the first three factors thus weighed against the government (length and cause of the delay), the court held that petitioner's "showing of prejudice need not be as strong as if the majority of the factors had weighed against [him]." *Id.* at 92. Even so, the court concluded that petitioner had not made a sufficient showing of prejudice to warrant dismissal. The court observed that petitioner "was never subject to pretrial incarceration and could not have suffered any 'anxiety and concern' relating to his indictment until he first learned of it in September, 1988." *Id.* at 94. The court likewise found that petitioner did not suffer any prejudice after he learned of the indictment, because he had not shown that his defense was impaired. In particular, the court could not find that the loss of some tape-recorded conversations impaired petitioner's defense, because petitioner presented no proof that the tapes contained exculpatory evidence or that the government destroyed them in bad faith, and because the individuals who appeared on the tapes were all available to testify. *Id.* at 96-97. In sum, since petitioner failed to show either that the first three factors weighed heavily in his favor or that he suffered actual prejudice, the court found no Sixth Amendment violation. *Id.* at 98.[3]

ARGUMENT

Both courts below correctly rejected petitioner's constitutional speedy trial claim. To determine whether a defendant's Sixth Amendment right to a speedy trial has been violated, the courts must weigh the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and the prejudice, if any, to the defendant. *Barker*

---

[3] Judge Clark dissented. Pet. App. 98-105. In his view, the government was "grossly negligent" in failing to locate petitioner for eight years, and therefore both the first and second factors of the *Barker* test should be weighed heavily against the government. *Id.* at 101-102. He also believed that the absence of prejudice was insufficient to overcome the force of those factors. *Id.* at 103-105.

v. *Wingo*, 407 U.S. at 530. With respect to the last factor, although "an affirmative demonstration of prejudice" is not essential to a successful speedy trial claim, *Moore* v. *Arizona*, 414 U.S. 25, 26 (1973), a constitutional violation is rarely found in the absence of a showing of actual prejudice. See, *e.g.*, *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986) (the mere possibility of prejudice is not enough to support defendants' speedy trial claim).

In arguing that his Sixth Amendment right to a speedy trial was violated, petitioner does not claim that he was prejudiced by the delay. Instead, he argues (Pet. 17-18) that the court of appeals misapplied the *Barker* v. *Wingo* balancing test because it held, in effect, that "an affirmative showing of prejudice is always required." But that is not what the court of appeals held. To the contrary, the court held that a "defendant need not show actual prejudice * * * if the other three factors weigh heavily against the prosecution." Pet. App. 77. Consequently, the court did not adopt a rule that is inconsistent with *Moore* v. *Arizona*, as petitioner suggests. Instead, the court simply held that in the absence of a demand for a speedy trial or some showing of prejudice, the government's conduct in this case, which the court found to be merely negligent, was not sufficient to tip the scale in favor of dismissal. Compare *Barker* v. *Wingo*, 407 U.S. at 531 ("negligence" is a "more neutral reason" for delay than a "deliberate attempt to delay the trial" in order to hamper the defense). Moreover, the government's conduct and the delay in this case must be assessed in light of the confusion and difficulties occasioned by petitioner's own conduct, his travel to Colombia and Panama, and his arrest in Panama.

The court of appeals' treatment of the issue of prejudice is entirely consistent with the analysis in decisions of this Court. For instance, in *Barker* v. *Wingo*, the Court held that although the "extraordinary" delay in that case was presumptively prejudicial, Barker did not claim that he lost any evidence as a result of the delay, and therefore the "absence of serious prejudice" weighed against him. 407 U.S. at 534. Likewise, in *United States* v. *Loud Hawk*, the Court held that the mere "possibility of prejudice [was] not sufficient to support respondents' position that their speedy trial rights were violated." 474 U.S. at 315. As these cases show, a defendant may not rest on a presumption of prejudice to establish a constitutional violation where there has been no bad faith on the part of the government. Because petitioner apparently was unaware of the outstanding charges, and therefore was neither detained nor anxious as a result of the indictment, he could establish prejudice only by showing that his defense was impaired in some way by the passage of time. He failed to do so. Both courts below balanced the relevant factors in this case, and found that the total absence of prejudice more than outweighed the government's negligence in failing to locate petitioner for eight years. That balancing is all that *Barker* v. *Wingo* and *Moore* v. *Arizona* require.

Petitioner also asserts (Pet. 18) that the court of appeals ignored this Court's statement in *Smith* v. *Hooey*, 393 U.S. 374, 383 (1969), that the government has a "constitutional duty to make a diligent, good faith effort to bring" a defendant to trial. To the contrary, the court of appeals explicitly acknowledged that requirement, stating that "the government has a constitutional duty to make a diligent

good-faith effort to locate, apprehend, and bring to trial the accused." Pet. App. 79. Because the government's effort in this case was insufficient, the court of appeals weighed the "cause of delay" factor against the government. Nevertheless, the court held that where, as here, the delay was not deliberate but was the result of negligence, this factor carries less weight. *Id.* at 85-86. The court of appeals did not, as petitioner suggests (Pet. 18), find that the delay in this case was "deliberate." See generally Pet. App. 79-86.

In short, petitioner's speedy trial claim is predicated on a misreading of the opinion below. The court of appeals carefully and correctly applied the *Barker* v. *Wingo* balancing test to the facts of this case. Because the court's decision is not in conflict with any decision of this Court or any other court of appeals, further review of petitioner's fact-bound claim is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

FEBRUARY 1991

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Supreme Court, U.S.
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No. 90-857

In The

Supreme Court of the United States

October Term, 1991

MARC GILBERT DOGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

Wm. J. Sheppard
Elizabeth L. White
Sheppard and White, P.A.
215 Washington Street
Jacksonville, Florida 32202
Counsel for Petitioner

Kenneth W. Starr
Solicitor General
Robert S. Mueller, III
Assistant Attorney General
Patty Merkamp Stemler
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Respondent

Petition For Certiorari Filed November 30, 1990
Certiorari Granted February 25, 1991

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs.

MARC GILBERT DOGGETT,
LUIS EDWARDO
ORTIZ-CRISTONCHO

Case No.
80-11-Cr-J-16

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

Feb. 22, 1980 – Indictment returned at Jacksonville, Florida.

Feb. 22, 1980 – Motion and Order for capias.

Feb. 22, 1980 – Warrant for arrest of defendant issued.

Sept. 9, 1988 – Notice setting arraignment for Tuesday, September 10, 1988 at 10:30 a.m. in Courtroom #6, Third Floor, Jacksonville. (Parties notified).

Sept. 14, 1988 – Return on warrant for arrest of defendant executed September 5, 1988, by United States Marshal.

Sept. 20, 1988 – Record of Hearing: Arraignment.

Sept. 28, 1988 – Motion to continue trial, status and discovery hearings and incorporated memorandum, by Government.

Oct. 11, 1988 – Motion to dismiss for sixth amendment speedy trial violation, by defendant.

Oct. 11, 1988 – Memorandum in support of motion to dismiss for sixth amendment speedy trial violation, by defendant.

Oct. 19, 1988 – Memorandum in Opposition to defendant Doggett's motion to dismiss for sixth amendment speedy trial violation, by United States.

Oct. 24, 1988 – Supplemental memorandum in support of motion to dismiss, by defendant.

Oct. 27, 1988 – Amendment to supplemental memorandum in support of motion to dismiss, by defendant.

Nov. 15, 1988 – Second supplemental memorandum in support of Doggett's motion to dismiss for sixth amendment speedy trial violation, by defendant.

Nov. 21, 1988 – (Joint) motion for continuance.

Nov. 21, 1988 – Record of hearing: Motions to dismiss.

Dec. 8, 1988 – Motion for continuance of motion to dismiss hearing and trial, by United States.

Dec. 14, 1988 – Record of hearing: Motion to Dismiss.

Dec. 19, 1988 – Third supplemental memorandum in support of defendant's motion to dismiss for sixth amendment speedy trial violation, by defendant.

Dec. 19, 1988 – Post-hearing memorandum in opposition to defendant's motions to dismiss, by Government.

Dec. 27, 1988 – Report and recommendation that the motions to dismiss be denied.

Jan. 6, 1989 – Objections to magistrate's report and recommendations and request for oral argument, by defendant.

Jan. 17, 1989 – Memorandum in opposition to defendant Doggett's objections to the magistrate's report and recommendation, by United States.

Jan. 31, 1989 – Order. Defendant's motions to dismiss the indictment for violation of the sixth amendment right to speedy trial are denied.

Feb. 6, 1989 – Record of hearing: Change of plea.

Mar. 31, 1989 – Record of hearing: Sentencing.

Mar. 31, 1989 – Judgment and probation/commitment order.

Apr. 3, 1989 – Notice of appeal (of judgment), by defendant.

Sept. 26, 1990 – Judgment from USCA that it is ordered and adjudged by this local court that the judgment of conviction of the said District Court in this cause be and the same is hereby affirmed. Issued as mandate 9/24/90.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA	No. 80-11-CR-J-JHM (21 USC 963, 952(a), 960) (15 yrs./$25,000/Both, Special Parole Term: 3 yrs. to life) (21 USC 846, 841(a)(1)) 15 hrs./$25,000/Both, Special Parole Term: 3 yrs. to life) (21 USC 843(b)) (4 yrs./$30,000/Both)
vs.	
WILLIAM F. BARNES	
LUIS EDWARDS ORTIZ-CRISTONCHO	
MARC GILBERT DOGGETT	
FABIO MORENO	
JANE DOE, a/k/a/ Maria Moreno	
LILLIAN ORTIZ-RAMIREZ	
ALLEN LEE RIDDLE	
DIEGO ALBERTO VALENCIA-VASQUEZ	

INDICTMENT

The Grand Jury charges:

COUNT ONE

In or about August, 1979, and continuously thereafter up to and including the first day of January, 1980, in the Middle District of Florida and elsewhere,

WILLIAM F. BARNES
LUIS EDWARDO ORTIZ-CRISTONCHO
MARC GILBERT DOGGETT
FABIO MORENO
JANE DOE,
a/k/a Maria Moreno
LILLIAN ORTIZ-RAMIREZ
ALLEN LEE RIDDLE
DIEGO ALBERTO VALENCIA-VASQUEZ

the defendants herein, willfully, knowingly, intentionally and unlawfully did combine, conspire, confederate and agree with each other, and with divers other persons whose names are known and unknown to the Grand Jury, to knowingly, unlawfully, willfully and intentionally import into the United States a quantity of cocaine, a Schedule II controlled substance under Title 21, United States Code, Section 812(c), in violation of Title 21, United States Code, Sections 952(a) and 960.

OVERT ACTS

In furtherance of the aforesaid conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Middle District of Florida and elsewhere:

1. In or about August, 1979, Fabio Moreno and Diego Alberto Valencia-Vasquez met with Ivan Cifuentes, a cooperating individual, in Bogota, Columbia.

2. In or about August, 1979, Fabio Moreno and Lillian Ortiz-Ramirez met with Ivan Cifuentes, a cooperating individual, in Bogota, Colombia.

3. In or about September, 1979, Allen Lee Riddle and Marc Gilbert Doggett met with Ivan Cifuentes, a cooperating individual, in Jacksonville, Florida.

4. On or about November 17, 1979, at approximately 3:00 P.M., Marc Doggett had a telephone conversation with Ivan Cifuentes, a cooperating individual, concerning the availability of a quantity of cocaine provided by Fabio Moreno.

5. On or about November 20, 1979, at approximately 7:00 P.M., Fabio Moreno had a telephone conversation with Ivan Cifuentes, a cooperating individual, concerning cocaine provided by Fabio Moreno and a trip to North Carolina regarding same.

6. On or about November 21, 1979, at approximately 12:30 P.M., Marc Doggett had a telephone conversation with Ivan Cifuentes, a cooperating individual, concerning cocaine provided by Fabio Moreno and the collection from Doggett of $14,000.00 Doggett owed Fabio Moreno for the last 200 grams Moreno sent Doggett.

7. On or about November 22, 1979, Fabio Moreno had a telephone conversation with Ivan Cifuentes, a cooperating individual, concerning cocaine provided by Fabio Moreno and the collection of a sum of money owed by Marc Doggett to Fabio Moreno and to bring it to Nassau, Bahamas.

8. On or about November 22, 1979, at approximately 1:30 A.M., Marc Doggett had a telephone conversation with Ivan Cifuentes, and advised Cifuentes that he had 5 grams of cocaine provided by Fabio Moreno for Cifuentes.

9. On or about November 24, 1979, at approximately 12:15 P.M., Marc Doggett met in Raleigh, North Carolina, with Ivan Cifuentes, a cooperating individual, and Drug Enforcement Special Agent Douglas Driver, who was acting in an undercover capacity, and delivered 5.7 grams of cocaine provided by Fabio Moreno to Agent Driver and Ivan Cifuentes, and $6,800.00 in United States currency for delivery to Fabio Moreno.

10. On or about November 26, 1979, at approximately 11:30 A.M., Fabio Moreno and Luis Edwardo Ortiz-Cristoncho met with Special Agent Driver who was acting in an undercover capacity and Ivan Cifuentes, a cooperating individual, in Nassau, Bahamas, and had a conversation concerning the availability of a quantity of cocaine to be provided by Fabio Moreno and arranging for Agent Driver and Ivan Cifuentes to receive a sample of same.

11. On or about December 3, 1979, at approximately 12:00 midnight, Jane Doe, a/k/a Maria Moreno, while in Bogota, Colombia, had a telephone conversation with Ivan Cifuentes, a cooperating individual, who was in Jacksonville, Florida, concerning the receipt of a sum of money and the delivery of cocaine provided by Fabio Moreno.

12. On or about December 9, 1979, at approximately 1:30 A.M., Fabio Moreno, while in Bogota, Colombia, had a telephone conversation with Ivan Cifuentes, a cooperating individual, in Jacksonville, Florida, concerning cocaine Fabio Moreno would have delivered in Miami, Florida.

13. On or about December 22, 1979, at approximately 1:30 A.M. Fabio Moreno, while in Bogota, Colombia, had a telephone conversation with Ivan Cifuentes, a cooperating individual, in Jacksonville, Florida, advising Cifuentes that Moreno would be sending something up on Monday, December 24, 1979, and that it would be either Diego Alberto Valencia-Vasquez or Lillian Ortiz-Ramirez. Further, that the people in North Carolina now owed him $6,700.00.

14. On or about December 23, 1979, at approximately 8:00 P.M., Jane Doe, a/k/a Maria Moreno, while in Bogota, Columbia, had a telephone conversation with Ivan Cifuentes, a cooperating individual, in Jacksonville, Florida, concerning Lillian Ortiz-Ramirez' arrival in Miami, Florida, on December 24, 1979, with a quantity of cocaine provided by Fabio Moreno and the collection of a sum of money.

15. On or about December 23, 1979, Jane Doe, a/k/a Maria Moreno, at Bogota, Colombia, delivered to Lillian Ortiz-Ramirez approximately 227 grams (gross) of cocaine.

16. On or about December 24, 1979, at approximately 5:00 A.M., Jane Doe, a/k/a Maria Moreno, while in Bogota, Colombia, had a telephone conversation with Ivan Cifuentes, a cooperating individual, in Jacksonville, Florida, concerning Lillian Ortiz-Ramirez' scheduled arrival in Miami, Florida, on December 24, 1979, with a quantity of cocaine provided by Fabio Moreno.

17. On or about December 24, 1979, Lillian Ortiz-Ramirez flew from Bogota, Colombia, to Miami, Florida, and was in possession of approximately 227 grams of cocaine provided by Fabio Moreno.

18. On or about December 24, 1979, William F. Barnes, met in Miami, Florida, with Ivan Cifuentes, a cooperating individual, and Special Agent Douglas Driver who was acting in an undercover capacity, concerning the expected arrival of Lillian Ortiz-Ramirez in Miami with a quantity of cocaine provided by Fabio Moreno and the purchase by William F. Barnes of a portion thereof.

19. Or or about December 24, 1979, William F. Barnes met in Miami, Florida, with Special Agent Douglas Driver, who was acting in an undercover capacity, and Ivan Cifuentes, a cooperating individual, and delivered to Agent Driver the sum of $1,000.00 for the purchase of a quantity of cocaine.

20. On or about December 24, 1979, Allen Lee Riddle had a telephone conversation with Ivan Cifuentes, a cooperating individual, concerning the whereabouts of Lillian Ortiz-Ramirez and the cocaine she was expected to deliver.

21. On or about December 24, 1979, Luis Edwardo Ortiz-Cristoncho had a telephone conversation with Ivan Cifuentes, a cooperating individual, concerning the whereabouts of Lillian Ortiz-Ramirez.

22. On or about December 30, 1979, at approximately 5:45 P.M., Allen Lee Riddle had a telephone conversation with Ivan Cifuentes, a cooperating individual, inquiring about the whereabouts of Lillian Ortiz-Ramirez and his need for the cocaine she was expected to have delivered.

All in violation of Title 21, United States Code, Section 963.

COUNT TWO

In or about August, 1979, and continuously thereafter up to and including the first day of January, 1980, in the Middle District of Florida elsewhere, the defendants

WILLIAM F. BARNES
LUIS EDWARDO ORTIZ-CRISTONCHO
MARC GILBERT DOGGETT
FABIO MORENO
JANE DOE,
a/k/a Maria Moreno
ALLEN LEE RIDDLE
DIEGO ALBERTO VALENCIA-VASQUEZ

did unlawfully, knowingly, willfully and intentionally combine, conspire, confederate and agree with each other and divers other persons known and unknown to the Grand Jury, to unlawfully, knowingly, willfully and intentionally possess with intent to distribute cocaine, a Schedule II controlled substance under Title 21, United States Code, Section 812(c), in violation of Title 21, United States Code, Section 841(a)(1).

OVERT ACTS

In furtherance of the aforesaid conspiracy and to effect the objects thereof, the overt acts, among others, set forth in Count One, which are hereby incorporated here by reference, were committed in the Middle District of Florida and elsewhere.

All in violation of Title 21, United States Code, Section 846.

COUNT THREE

On or about December 30, 1979, in the Middle District of Florida and elsewhere,

ALLEN LEE RIDDLE

knowingly and intentionally did use a communication facility, that is, a telephone, in facilitating the commission of the conspiracy in Count One and the conspiracy set forth in Count Two, each of which are incorporated herein by reference, in that Allen Lee Riddle called the Jacksonville telephone number of Ivan Cifuentes, a cooperating individual, and inquired about the whereabouts of Lillian Ortiz-Ramirez and communicated the need of Allen Lee Riddle for the cocaine Lillian Ortiz-Ramirez was expected to have delivered, in violation of Title 21, United States Code, Section 843(b).

A TRUE BILL

/s/ _____

GARY L. BETZ
United States Attorney

/s/ _____
BERNARD S. McLENDON
Assistant United States Attorney
Middle District of Florida
Post Office Box 600
Jacksonville, Florida 32202
904/791-2683

**TESTIMONY OF DOUGLAS L. DRIVER,
RALPH D. CARR AND DELORES DOGGETT**

Filed December 14, 1988

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,

vs. Case No. 80-11-Cr-J-16

MARC GILBERT DOGGETT,
LUIS EDWARDO ORTIZ-CRISTONCHO

Jacksonville, Florida
December 14, 1988
9:30 a.m.

MOTION TO DISMISS PROCEEDINGS
BEFORE THE HONORABLE HARVEY E. SCHLESINGER
UNITED STATES MAGISTRATE

APPEARANCES:

For the Plaintiff: Assistant US Attorney
BY: Thomas E. Morris, ESQ.
311 West Monroe Street,#409
Jacksonville, Florida 32201

For the Defendants: BY: WM. J. SHEPPARD, ESQ.
215 Washington Street
Jacksonville, Florida 32202

BY: STEPHEN A. GLASS, ESQ.
330 Biscayne Boulevard
Penthouse Suite
Miami, Florida 33132

Court Reporter: Leslie M. Kutchaver
C&J Court Reporters, Inc.
2906 Independent Square
Jacksonville, Florida 32202

[3] PROCEEDINGS

9:30 a.m. December 14, 1988

* * *

[15] DOUGLAS L. DRIVER, having been produced and first duly sworn as a witness on behalf of the Government, then testified as follows:

DIRECT EXAMINATION

[23] THE COURT: There came a point in time, when this indictment was returned, that the obligation of the United States to try to bring these people to a speedy trial started. Now, I don't know what went on in Colombia with investigations about other defendants and what . . .

MR. MORRIS: This is what I'm trying to get to.

THE COURT: Well, but the problem is when was the first defendant arrested in this case?

MR. MORRIS: That will be about my third question from now.

THE COURT: Well, I'll ask that first. When was the first defendant arrested in this case?

THE WITNESS: I believe February 22nd.

THE COURT: Of 1980?

THE WITNESS: Of 1980, right after the indictment was returned.

THE COURT: And that's when he . . .

MR. MORRIS: Actually, that's incorrect I believe, Your Honor; although it's partially true.

THE COURT: Well, I have no idea.

[24] MR. MORRIS: Do you mean arrested on the indictment or arrested on the complaint or arrested on other evidence?

THE COURT: Do you want to testify? When did he – when was he . . .

THE WITNESS: Diego Valencia, one of the defendants, was arrested on February 22nd.

THE COURT: Okay. When was the first defendant arraigned in this case?

MR. MORRIS: On the indictment?

THE COURT: On the indictment.

MR. MORRIS: Well . . .

THE WITNESS: Well, I guess this defendant, Diego Valencia, was arrested on a complaint; then the indictment was done. The next arrests were made on Feb-, March 18, 1980.

THE COURT: Okay.

THE WITNESS: Arrests were made in North Carolina, and the attempt was made to arrest Doggett.

THE COURT: In March?

THE WITNESS: March 18.

THE COURT: Okay. So what do we care about what was going on in Colombia?

MR. MORRIS: Because that explains why there wasn't an earlier attempt than 26 days [25] to make an arrest on . . .

THE COURT: Well, we're worrying about eight years. Twenty-six days is insignificant; let's worry about eight years.

MR. MORRIS: Well, it's only one question, Your Honor. I would like it, for the record, to be stated. I think it is important.

THE COURT: As to why they didn't do anything for the 28 days?

BY MR. MORRIS:

Q: After the indictment, was there any other efforts in this case made concerning what you considered the lead defendants?

A: Yes. The informant was still in contact with relatives of his in Colombia, who were in contact with Fabio Moreno, who was on the run because of the seizure and the arrests in Colombia. So Moreno was still trying to learn what happened, who was arrested and why, and was in touch with the informant.

THE COURT: In Colombia?

THE WITNESS: The informant was back [26] here in the United States.

THE COURT: Where was Moreno?

THE WITNESS: Moreno was – he was either in the Caribbean somewhere or Colombia. But he was running from the police in Colombia.

Q: All right. The last time in your investigation that you had seen Mr. Ortiz, where was he in relation to Mr. Moreno?

A: He was with him, but they – that was in Nassau. We met – I met Moreno and Ortiz together and negotiated for the 50 keys in Nassau.

Q: All right. Subsequent to that, you went to Colombia?

A: Yes.

Q: Was Mr. Ortiz also in Colombia?

A: No.

Q: Okay. At least you didn't see him there?

A: I didn't . . .

MR. GLASS: I'm going to object. He just said that he didn't see him; we don't have to go through this over and over again.

THE COURT: Well, if we're talking about dates it might help, also. Was it before or after the indictment?

MR. SHEPPARD: Judge, I would [27] respectfully submit that this agent doesn't know when the indictment, according to his testimony, and I would suggest it's because of the passage of time, when the indictment was issued. He's testified . . .

MR. MORRIS: He has already testified to that.

MR. SHEPPARD: I know he's testified to it, but I would ask the Court to take judicial notice of the court file. The date is wrong.

THE COURT: It's February 22nd, 1980.

MR. SHEPPARD: Yes, sir. He said that it came after that; that the first defendant was arrested on the

22nd. And thereafter, there was an indictment. And that's wrong.

THE COURT: Well, he said that the defendant may have been arrested before the indictment was returned on the 22nd. The man may have been arrested at 8:00 o'clock in the morning.

MR. SHEPPARD: I understood, and I believe the record will reflect, that his testimony was that the indictment was returned on March 18, 1980, which is incorrect.

MR. MORRIS: No.

THE COURT: No, February 22nd, 1980.

MR. SHEPPARD: I stand corrected, thank you.

THE COURT: I've got it right here; [28] that's when it was signed. And I have no idea what time of day it may have been returned. Go ahead.

BY MR. MORRIS:

Q: Was it your belief, at the time of the indictment, that some of the major defendants in this case were still outside of the United States?

A: Yes.

Q: And were you trying to get them in the United States to arrest them?

A: Yes.

Q: All right. By March 18th, you decided to go ahead and make the arrests of those you knew were in the United States; is that correct?

A: Yes.

Q: And where did that effort take place?

A: I had some agents go attempt to arrest three of the defendants in North Carolina.

Q: And who were those defendants?

A: One of them was named Allen Riddle, one William Barnes and the third was Marc Doggett. Marc Doggett was not arrested; the other two were.

Q: On March 18?

A: On March 18.

Q: 1980?

A: Yes.

[29] Q: Who made the effort to arrest Mr. Doggett that day?

A: It was some people working with the DEA office in Raleigh, North Carolina. One was named Charles Overton; he's a North Carolina State Bureau of Investigation agent.

Q: And did you receive any word from him as to whether Mr. Doggett was arrested that day?

A: Yes. He told me that he made an attempt to arrest Doggett. And he interviewed Doggett's mother and learned that Doggett had left for Colombia on March 14th, four days earlier, 1980.

And Overton told me that he told Doggett's mother about the arrest warrant. And she seemed cooperative.

As a matter of fact, she told him that she knew that Doggett had gone to Colombia to pick up cocaine, and that she hoped that he would be arrested to get him out of the – that business.

Q: Did she indicate whether she would advise Agent Overton if Mr. Doggett returned home?

A: Yes.

Q: I show you what has been marked as Government's Exhibits No.1 and 2 (tendering). Do you recognize Exhibit No. 1?

A: Yes, I do.

Q: And what is it?

[30] A: It's a teletype from me sent to all the United States Customs stations, EPIC and INTERPOL, stating that Marc Gilbert Doggett is currently wanted by DEA pursuant to an arrest warrant issued in the middle district of Florida. It gives the warrant number, the date, 2/20/1980.

And it says that Doggett is not yet in NCIC, but it says that he departed Raleigh by Eastern Air Lines en route to Bogota; that he stopped in Miami to renew or obtain a new passport, number not yet known, and that he may return back to the United States carrying approximately 300 grams of cocaine; that he's traveling with a cousin, named William Doggett, and it gives a brief description of him, and my name and phone number as a contact number.

Q: And what is the date of the teletype?

A: March 18th, 1980.

MR. MORRIS: Your Honor, I would ask that Exhibit No. 1 be admitted.

THE COURT: Any objections?

MR. SHEPPARD: No.

THE COURT: Any objections?

MR. GLASS: No, Your Honor.

THE COURT: Exhibit 1 will be admitted.

(Government's Exhibit No. 1 received in evidence.)

BY MR. MORRIS:

[31] Q: Referring to Exhibit No. 2, would you state what that is?

A: (Witness perusing document.) Exhibit No. 2 is a DEA-6 written by the agent in charge of the DEA office in Wilmington, North Carolina. It details the arrest of William Barnes and Allen Riddle, and the attempt by Agent Overton of the North Carolina State Bureau of Investigation, and Officer Larry Rawlins, from the Wade County ABC Board, it details their attempt to arrest Marc - Marc Doggett and the interview of Doggett's mother.

MR. MORRIS: All right. Your Honor, I would ask that Exhibit 2 be admitted at this time.

THE COURT: Any objections?

MR. SHEPPARD: No objection.

MR. GLASS: No objection.

THE COURT: Exhibit 2 will be admitted.

(Government's Exhibit No. 2 received in evidence.)

THE COURT: But as of March 18th, you still had not enlisted the services of the marshal to try to arrest these people . . .

THE WITNESS: That is correct.

THE COURT: . . . just these North Carolina officers?

BY MR. MORRIS:

[32] Q: At that point - or, between February 22nd and March 18th, was there any effort made to arrest Defendant Ortiz?

A: I believed, at that time, that he was out of the country. I had no way of knowing that he lived in the United States, if he did. I don't know.

Q: All right. And what was the basis for your belief that he was out of the country or not . . .

MR. GLASS: Excuse me, Judge. I may be a little slow here, but I thought the question was, Was any effort made; and I don't believe the answer was responsive to whether an effort was made or not.

MR. MORRIS: Do you want me to rephrase the question?

THE COURT: Please.

BY MR. MORRIS:

Q: All right. At that time period, had agents gone to any particular location looking to arrest Mr. Ortiz?

A: No.

Q: Why not?

A: I believed that he was living in Colombia; I had a Colombian address. I believed that he was a Colombian citizen. And at the time there was no extradition or anything from Colombia, so I had no way of arresting him or sending anyone to arrest him.

[33] Q: Where had you obtained a Colombian address from?

A: When I negotiated with Mr. Ortiz in Nassau, along with Moreno, for the 50 kilograms of cocaine, after – he was registered at a hotel there.

After he left, or after the two of them left, I got the registration information from the hotel. And that's how I identified him. I got his full name; I got his passport number, and I got his address. The address was a street address in Bogota.

Q: Was it – did you ever see his passport, per se?

A: No. I never actually saw the passport, just the number.

THE COURT: And when did you do this?

THE WITNESS: This was in, I believe, November 1979.

BY MR. MORRIS:

Q: Did you make entries into NCIC at some point?

A: What I – I don't actually make entries myself into NCIC. I fill out a fugitive declaration form, is the way it's normally done. I filed out a fugitive declaration form and sent it in through DEA channels. And it's eventually sent to NCIC. Eventually Ortiz was entered into NCIC, on 5/24/1980.

Q: Okay. NCIC stands for . . .

A: The National Crime Information Center; it's a computer.

[34] Q: Okay, I show you Exhibit No. 3, first of all (tendering). I'm going to hand you 4, you can look at it in a minute. Do you recognize what Exhibit No. 3 is?

A: It's a United States Department of Justice Wanted Person Report.

Q: And is that the form that Agent Keith of DEA in Washington fills out that goes into NCIC?

A: Yes.

Q: And when was that entered?

A: (Witness pausing.)

Q: Is there a date at the bottom someplace?

A: 5/11/80.

Q: Okay. And when – referring to Exhibit No. 4, would you state what that is?

A: It's the same form, United States Department of Justice Wanted Person Report, for Marc Doggett.

Q: And when was that entered into NCIC?

A: 4/02/81.

Q: Do you have any – do you know why Doggett was entered so much later than Mr. Ortiz was?

A: Well, I had sent this teletype, putting Doggett . . .

Q: You're referring to Exhibit No. 1?

A: Exhibit No. 1, putting Doggett in TECS and putting him on lookout. And I had [35] assumed that he would go into all the computers at that time, as being wanted. And I later learned that he had not gone into NCIC; so I filled out the forms and did that in 1981.

Q: Okay. When did – approximately when did the trial begin on Defendants Barnes and Riddle?

A: September 2nd, 1980.

Q: And did it conclude within a matter of a few days or a couple of weeks?

A: Around a week.

Q: When was the next time that you heard anything about the potential or possible location of Mr. Doggett?

A: In, I believe, October or – or, I learned that Marc Doggett had been arrested by Panamanian authorities on September 21, 1981.

Q: Do you recall how you learned that?

A: I either got a telephone call or a teletype from Leonard Williams, the agent in charge of the Panama country office in the Republic of Panama.

Q: And as a result of getting that information what, if anything, did you do?

A: Well, I had a series of telephone calls with Leonard Williams. And I eventually sent him a driver's license, that I had in my possession, for Marc Doggett. [37] When I originally negotiated for 50 kilograms of cocaine with Ortiz and Moreno, Moreno told me I could get a sample of the cocaine from Marc Doggett. He told me that Doggett had been getting cocaine from him on a regular basis, and that Doggett owed him a lot of money.

Q: This was in . . .

A: So I sent this driver's license to Williams to see if this was the same person who had been arrested. And he sent it back to me and said that it was.

Q: Okay.

THE COURT: Just so the record is clear: Mr. Sheppard, you had asked, the clerk's file of the papers that accompanied the indictment in this case were filed in the clerk's office February 22, at 4:19 p.m., which is a pretty good indication to me that the indictment was probably returned that afternoon.

On February 26 of 1980, at 10:39 p.m., a United States marshal from this district sent the indictment warrant to the United States Marshal for the Southern District of Florida with respect to Diego Alberto Valencia Vasquez.

The warrant for Mr. Vasquez's arrest was executed by a DEA agent in the southern [37] district of Florida and a deputy US marshal by the name of Robert

N. Green. And it says that he was arrested on an outstanding indictment warrant on February 22nd, 1980.

BY MR. MORRIS:

Q: The conversation you just mentioned, where you had obtained the driver's license, where did that occur?

A: In Nassau, Bahamas.

Q: Okay. What requests did you make of Agent Williams with regard to Mr. Doggett, if any?

A: Told him that Doggett was wanted in the United States, and asked if he would initiate proceedings with the Panamanian authorities to have him returned to the United States for trial.

Q: Now, what was Mr. Williams' position in Panama?

A: He was the agent in charge of the DEA operations there, the country attache.

Q: Okay. Did you subsequently receive some reports from him concerning Mr. Doggett?

A: Yes.

Q: And I show you Exhibit No. 5 and (pausing), well, 5 at this point (tendering).

A: Exhibit No. 5 is the DEA-6 by Mr. Williams, detailing the arrest of Marc Doggett by Panamanian authorities on September 21, 1981.

Q: All right. Had he also sent you [38] teletypes prior to the DEA-6?

A: Yes.

Q: Did Mr. Williams indicate to you whether he did make a request to Panama that they release Mr. Doggett to the United States, at some point?

A: Yes. And his report reflects that he submitted a written request that Doggett be expelled to the United States when the Panamanian prosecution is completed. His report reflects that the attorney general of Panama indicated his concurrence with this request in a letter dated October 15th, 1981.

Q: Have you ever seen . . .

THE COURT: What was the date on that request?

THE WITNESS: The attorney general's request – or, response is dated October 15, 1981.

BY MR. MORRIS:

Q: Through conversations with Mr. Williams, who is it, in your understanding, that would make the decision to release Mr. Doggett to the United States?

MR. SHEPPARD: I object. That calls for a legal conclusion.

MR. MORRIS: It's based on Mr. Williams' experience in the country, Your Honor.

MR. SHEPPARD: Judge, it doesn't matter [39] what his experience is; it's what the law is. I've cited cases where people have been extradited from Colom –, I mean from Panama; I have attached all of the treaties. And it is a legal conclusion.

The problem is, is that we don't have the document that Mr. Williams refers to in his DEA-6, which is a written request. I respectfully submit that our position is that the treaties, in black and white, tell you what you must submit to the Panamanian authorities in order to implement the extradition treaty.

THE COURT: Well, they weren't trying to implement the treaty. He just testified what he was trying to do, was to get the man thrown out of the country. Expelled and extradition are two different things. Now, if he wants to testify he was trying to do it through the treaty, I'll listen to him.

MR. SHEPPARD: I understand. The other problem is that we don't have this written request to the Panamanian authorities to even expel him. We don't have it.

THE COURT: Go ahead.

BY MR. MORRIS:

Q: Did you have conversations with Mr. Williams, both at that time and subsequent to that, as to what he was doing in there and who he was contacting?

[40] A: Yes. He was dealing directly with . . . at the time, it was Colonel Noriega, now General Noriega.

Q: Was it your understanding, through Mr. Williams, that that was the person that made the decisions on who to release to the United States?

A: Yes.

Q: Through your conversations with Mr. Williams . . .

THE COURT: Just one second. Release them by throwing them out of the country unofficially? or going through the extradition treaty?

THE WITNESS: It would have been an expulsion, as an undesirable.

THE COURT: Okay.

BY MR. MORRIS:

Q: Did Mr. Williams tell you that this procedure had worked in other cases other than Mr. Doggett's?

A: Yes.

Q: That they released persons arrested there, that the United States wanted, just to the DEA?

A: Yes.

Q: Or bring them back to the United States.

A: Yes.

Q: Do you know . . .

THE COURT: Just so that the record is clear, too: Mr. Sheppard, according to the [41] court file and I think that some of the documents may not be in the correct sequence, Mr. Valencia Vasquez was arraigned in this court on March 24th of 1980, which means that the indictment, at that date, had to be made public, if it wasn't made public in Miami at his removal hearing. And I do have a date in Miami (perusing), just bear with me a minute.

February 28th of 1980 was the date of the removal hearing. And there are indications in the file that there

was live testimony that was taken in Miami, which would indicate to me the indictment was made known.

MR. SHEPPARD: What was that arraignment date in the middle district, Judge?

THE COURT: Excuse me, I'll find it again.

MR. SHEPPARD: I'm sorry.

THE COURT: March 25th – oh, that was the bond (perusing), here it is. The arraignment was March 24th. Go ahead.

MR. SHEPPARD: Thank you, Your Honor.

MR. MORRIS: Do you recall what my last question to you was?

THE WITNESS: No.

MR. MORRIS: Was there a question on the floor before that comment?

[42] (Thereupon, the last question was read back by the court reporter.)

BY MR. MORRIS:

Q: Do you know why the original letters that the United States wrote to Panama, and the Panamanian attorney general responded . . .

MR. SHEPPARD: I object to assuming facts not in evidence. There is no evidence of any letters, other than double hearsay.

THE COURT: Well, I assume what he testified from the DEA-6, that it was sent to him, that will travel on hearsay.

MR. MORRIS: I would ask that Exhibit No. 5 be admitted at this time.

THE COURT: That's which number?

MR. MORRIS: No. 5.

MR. SHEPPARD: No objection.

THE COURT: Okay, No. 5 will be admitted. You don't have 3 and 4 admitted.

MR. MORRIS: I would ask those be admitted, too.

THE COURT: Any objections?

MR. SHEPPARD: No, sir.

MR. GLASS: No, Judge.

THE COURT: Nos. 3 and 4 will be [43] admitted, as well as 5. You may answer the question; I'll overrule the objection.

(Government's Exhibit Nos. 3, 4 & 5 received in evidence.)

BY MR. MORRIS:

Q: Those documents that are referred to in the DEA – Exhibit No. 5, do you know why those are not here in this courtroom?

A: Yes.

Q: Or do you have any understanding as to why they aren't present in the courtroom?

A: Yes. I transferred from Jacksonville to Panama in August of 1985. One of the first things I did was check on

the status of Marc Doggett, because I thought he was still in jail when I got there.

I learned, when I got there, that Doggett had been released. And I was unable to learn when, at what date. I went looking for the DEA files. And at that time, I learned that in our overseas embassies and in our foreign offices we only keep the files for as long as they're really active, for a very short period, because of the possible – the potential for our embassies to be overrun, or that sort of thing, and files be stolen.

So they purge the files very frequently in our foreign offices. And they didn't have [44] the file when I got there in 1985; and I don't know when – when it was purged or burned. And I don't . . .

MR. SHEPPARD: I object to his testifying it was burned; he doesn't know whether it was burned or shredded, or what was done.

THE COURT: He doesn't know, he doesn't know what happened to it.

THE WITNESS: I know the files are routinely shredded, in our foreign offices, about every six months.

BY MR. MORRIS:

Q: Is it your statement that that policy stems from the fact that embassies in other parts of the world have been raided by persons in those countries and documents seized and made public?

A: Yes.

Q: At what point did Mr. Williams get transferred or leave Panama?

A: Early 1982.

Q: Was it in July of '82?

A: Yes, July of '82.

Q: And at the point he left, had he ever received any further communication, to your knowledge . . .

MR. SHEPPARD: I object, Your Honor.

BY MR. MORRIS:

Q: . . . through your conversations with him [45] about Mr. Doggett?

A: No. He believed Doggett to be still in jail in Panama when he left.

Q: When did you get transferred to Panama?

A: August 1985.

Q: And at that point you had received no more – at that point, you had received no more word from Mr. Williams or anyone else about Mr. Doggett's whereabouts?

A: No. As a matter of fact, I was still writing status reports on the status of the fugitives in this case. And I was still saying that he was in jail in Panama and that we would be notified when he had finished serving his time, and that he would be expelled to the United States.

THE COURT: If Williams left in July of 1982, and the file was destroyed six months after it was created, what was going on between 1982 and 1985? What if somebody called DEA and said, Doggett is ready to be released? They wouldn't have a file on Doggett.

BY MR. MORRIS:

Q: Well, were there other agents that eventually replaced – or, an agent that replaced Mr. Williams there?

A: Yes. I don't know exactly when the file [46] was destroyed; I said routinely, when there is no further action in a file, it's destroyed after about six months but . . .

* * *

[51] Q: Do you know whether – well, during the time you were in Panama, did you become aware of cases where US citizens were arrested where DEA had an interest in them also?

[52] A: Yes.

Q: And did you communicate, when you learned of an arrest, that to the consulate part of the embassy?

A: Yes. If it was an American citizen, yes.

Q: Okay. If that citizen also was wanted in the United States, would you pass that information onto the consulate?

A: Yes.

Q: Prior to Mr. Doggett's arrest this year, had you ever received any more word, since 1985, when you went to Panama, as to where Mr. Doggett was?

A: Well, his – the paper work and everything that he had on him when he was arrested in Panama indicated that he was living in Bogota, Colombia, residing at a street address there.

He had – also had his brother's birth certificate with him. And he had stuff on him that indicated he was using a fake name, using the name of Marcus Pinzon, which is his mother's maiden name.

So, no, I believed and assumed that after he got out of jail in Panama that he returned to Colombia, where he had been living prior to that.

Q: Did you write a report based on the information you received from Agent Williams as to his arrest in Panama? Referring you to [53] Exhibit No. 6 for Identification (indicating document).

A: Yes.

Q: And when was that written?

A: April 26, 1983.

Q: Do you know why it was written at that time, rather than earlier?

A: No. Just I'm not that timely with my reports often.

Q: Well, did you have other cases you were working on during this period . . .

A: Yes.

Q: . . . other than Mr. Doggett and Mr. Ortiz?

A: Yes.

Q: And the information . . .

MR. MORRIS: Well, I would ask that Exhibit No. 6 be admitted at this time, Your Honor.

THE COURT: Any objections?

MR. SHEPPARD: May I see it briefly, Your Honor? Some of these are hard to read.

MR. MORRIS: Yes. Your Honor, I apologize for that.

MR. SHEPPARD: They're so old it's hard to . . .

(Messrs. Sheppard and Glass perusing document.)

[54] MR. SHEPPARD: I have no objection, Your Honor.

THE COURT: No. 6 will be admitted.

MR. GLASS: I have no objection, likewise, Your Honor.

(Government's Exhibit No. 6 received in evidence.)

BY MR. MORRIS:

Q: Was there anything in your files prior to his arrest that indicated – in DEA's file, that indicated Mr. Doggett had returned to the United States and was living in Virginia?

A: No.

Q: What is one of the purposes – let me withdraw that and rephrase it. You referred earlier to entering information in NCIC. Can you explain how NCIC works?

A: It's the National Crime Information Computer. And if someone is wanted in one state, you put the

information in, hoping maybe he will be caught in another state or in another jurisdiction.

It has wants and – wanted, and it has information regarding stolen property by serial numbers, weapons, that sort of thing. It's just a computer with a lot of different types of information in it; and it's very widely used.

For instance, people coming into the United States are randomly queried by Customs to see if they are fugitives. Or cars, for instance, I understand that there is like [55] 185,000 queries a day on license plates alone crossing the US border. There are 300,000 queries per day at international ports of entry concerning persons.

* * *

[57] MR. MORRIS: No, Your Honor. Mr. Sheppard has filed, in some of his pleadings, facts indicating that he intends to show that Mr. Doggett was living in Virginia for – since 1984, I think, or '85.

THE COURT: Filing tax returns, lived under his true name, used his right social security number, had a driver's license.

MR. MORRIS: That's right.

[58] THE COURT: I don't know. The last hearing I had, I heard all about how the deputy US marshal found somebody that a bunch of agents had been looking for for years, but no one bothered to check the driver's license place and they did.

MR. MORRIS: That is what I'm getting to right now, why he didn't check the driver's license place.

THE COURT: Well, you still haven't asked, still haven't asked that question.

MR. MORRIS: I think it's preliminary having to set up how NCIC works first. That's what I was getting to.

THE COURT: Well, how about how driver's license checks work. Maybe that would be better.

BY MR. MORRIS:

Q: All right. How do you make a driver's license check, Agent Driver?

A: Normally, we fill out a form and send it to the director of the Department of Motor Vehicles for each particular state, is how we normally do it.

Q: All right. Are you aware of whether it can be done through a system called NLETS?

A: I have recently learned that it can be done through NLETS. You can make a check [59] through the computer and check any state, their Department of Motor Vehicles, to see if someone has a license.

Q: Would the response you get on that be only for the exact spelling and date of birth, or whatever information you put in the request?

A: Yes.

Q: Do different states require different information as to driver's licenses? For example, some use social security numbers; some don't.

A: Yes.

MR. SHEPPARD: Your Honor, same objection as it was with regard to NCIC; it's a hypothetical. He ought to ask him what he did. If he did something, great; if he didn't do it . . .

MR. MORRIS: I think what he didn't do is important also, and why he didn't do it, Your Honor. The Government does not have the ability to do everything that Mr. Sheppard and Mr . . .

THE COURT: Well, why don't you ask him that, then?

MR. MORRIS: That is what I'm trying to ask.

THE COURT: Well, what did you ask him? You haven't asked him, Why didn't you make a driver's license check?

[60] BY MR. MORRIS: Why didn't you make a driver's license check in this case?

A: Because I thought Mr. Doggett was in jail in Panama. I had no reason to believe he would be getting a driver's license in any state in the United States.

Q: As just a routine procedure on all fugitives, why don't you just throw them all in the computer all over the nation?

A: It's just not possible. The computer can't handle that; and I, as a DEA agent, don't have the time to do that routinely and regularly.

Q: Have you had a conversation with a Mr. Jerry Smith recently?

A: Yes. Mr. Smith works at the – in Washington, D.C., at the NCIC headquarters. And he explained some of the problems associated with running these kind of checks through NCIC. For instance, he says it is possible . . .

MR. SHEPPARD: Your Honor, I object, unless he is testifying about a relevant time period. I mean, we're dealing with almost a decade here. And Jerry Smith may have been in high school during the relevant time period, but we don't know that.

BY MR. MORRIS:

Q: Are we talking about the last four-year [61] period, four to five years?

A: Yes.

THE COURT: Go ahead. I'll overrule the objection.

THE WITNESS: Mr. Smith says it is possible now to query all 50 states to see if an individual has obtained a driver's license however recently, or is currently registered in a certain state. But he says they – it's discouraged, that type of tying up of the computers. They certainly don't want to see it done routinely.

Q: Have they tried it in some cases?

A: Yes.

Q: And the result? Do they see good or bad results?

A: It can be done, but you have to know – it takes a computer expert, because you have to know what you are doing with it in each individual state.

Q: And you have to have identical information as appears in that state or it will not show up?

A: Yes.

Q: And as to Customs inquiries at the border, is that the same situation?

A: There are – the problems at the border are that if somebody uses an initial, period, instead of a full middle name, you may not [62] get a matchup; or if the date of birth is not correct. And oftentimes there is sometimes 30 hits on a particular name. And then it becomes up to the individual agent to sift through and see if there is a matchup. And there is just a lot of problems associated with using the computers like this.

Q: At the time you entered Mr. Ortiz in NCIC, did you have a date of birth for him?

A: No. I had his full name, Luis Edwardo Ortiz-Cristoncho, his passport number, his address in Colombia. And I had, you know, a physical description that I put in from my own observations. But, no, I had no date of birth.

Q: Did you – had you ever received information on Mr. Doggett that he used other names or other spellings of his name?

A: Yes, quite a lot of them. He uses Doggett, Doggart, Baggett, several other names.

Q: Prior to the arrest of Mr. Ortiz in the fall of 1988, on these charges, had you ever heard that he had been arrested in the United States?

A: No.

Q: Had you ever heard he was living in the United States?

A: No. I knew he traveled frequently to the United States, based on my conversations with him . . .

* * *

CROSS EXAMINATION

[63] BY MR. SHEPPARD:

Q: Good morning, Agent Driver. You testified about a policy of the Drug Enforcement Administration, which you applied in this case, to the effect that DEA would make arrests for individuals that DEA investigated and caused to be indicted.

A: Yes.

Q: As opposed to other agencies.

A: Yes.

[64] Q: And is that a written policy?

A: No.

Q: Is it a local policy of the DEA; that is, the regional office in Jacksonville, or the resident office in Jacksonville? or is it a nationwide DEA policy, if you know?

A: I believe it's a nationwide policy. We generally arrest the people we investigate ourselves, or at least make the initial attempts. And then if we can't, then –

and the people are declared fugitives after, say, approximately 30 days, then other agencies are asked to help, the marshals and the FBI.

For instance, all of our Class I and II fugitives, for about the last five years, were turned over to the FBI. And they made the active searches. They have the manpower. They have squads that do that normally. They have investigative aids, and that sort of thing; and DEA doesn't have them.

Q: Was Doggett a Class I or II fugitive?

A: No. He was a Class III.

Q: Why is that?

A: Well, we classify them on the basis of their – amount of drugs and whether or not they have people operating under them and whether they control an organization or not.

[65] Q: Class I being the most serious offender?

A: Yes.

Q: II, III . . . what other classes are there?

A: Just IV, which is like a real small-time distributor.

Q: So at what time period did the FBI become involved in effecting the apprehension of DEA fugitives?

A: It was about a five-year period that just ended recently, in the last few months.

Q: So it would have been from about '83 to '85 – '88?

A: I'm guessing five years. It could have been longer, I don't know.

Q: You are not guessing so much as you are estimating in recollecting it . . .

A: Yes.

Q: . . . would that be fair? And let me give you these exhibits back. Well, I believe the Court is using them.

(Thereupon, the clerk tendering requested documents to the witness for perusal.)

BY MR. SHEPPARD:

Q: Now, on the date that the indictment came out in this case you conferred – did you not? – with the assistant United States attorney to the effect that, I want to make these arrests or DEA wants to make these arrests; and we do not, although we lodged a warrant with the Marshals Office here in the middle district, [66] there was a memorandum prepared by the assistant United States attorney indicating that DEA would make the arrests?

A: Yes. We didn't want to duplicate effort.

Q: All right. And that memorandum was written by Assistant United States Attorney Bernard McLendon?

A: Yes.

Q: And he had assisted you in presenting this matter to the grand jury . . .

A: Yes.

Q: . . . obtaining the indictment?

MR. SHEPPARD: And I would ask the Court to allow me to ask the Court to take judicial notice of that memorandum, which . . .

THE COURT: It's in the file.

MR. SHEPPARD: . . . is in the file. In fact, I'd ask the Court to take judicial notice of the entire contents of the court file in this case.

BY MR. SHEPPARD:

Q: And that memorandum was written on the 22nd of February, 1980, the date the indictment was returned?

A: Yes.

Q: And at any time after February 22, 1980, until the present time, has that memorandum to the United States Marshals Office, to the effect that DEA would make the arrests in [67] this case, been rescinded, superceded, modified or changed?

A: I don't know that that memoranda has been. But, as I said, there was a period where we turned all of our Class I and II fugitives over to the FBI. And that would have been fugitives in cases '74, '75, '77, '80.

So for the last five years, up until just within the last couple of months, the FBI has been making active searches for the Class I and IIs. The IIIs, my understanding was, were being looked for by the Marshal Service. You know, I may be in error but . . .

Q: In this case, have you seen any document, talked to any person that would indicate that Doggett got put on a list for anyone other than you personally to look for, other than what you have testified?

A: He's been in NCIC and he's been in the computers. After 30 days of looking, normally we turn in a fugitive declaration report. And then, you know, he's fair game for anybody.

Q: Right. Where is that document, in this case, as it relates to Marc Doggett?

A: I originally put him in the TECS computer and no – that document was not filled out. Later, when I learned – realized that I had forgotten to do that, I had him put in NCIC. And that's – the date was 4/02/81. So he didn't go into NCIC until [68] '81. From that point on, the marshals and everybody . . .

Q: Presumably.

A: . . . presumably would have known that he was wanted.

Q: Right. My question is: At that time after February 22, 1980, there was a communication in writing or otherwise from the DEA to the United States Marshal Service saying that the February 22, 1980, memorandum telling you to hold off the dogs is changed; and we want you to release the dogs and capture Marc Doggett?

A: I don't know of any such document.

Q: You didn't cause one to be created nor are you aware of the existence of any such document?

A: The only thing was the fugitive declaration form. And I eventually did fill one out.

Q: That is the exhibit here; is it not?

A: No. There's – it is a DEA personal history form that has a fugitive declaration block on it: and it's checked and sent in. And that caused this document to be formed (indicating document).

Q: Refer to the exhibit number of the document that that caused to be created.

A: It caused Exhibit No. 4 to be created.

Q: What is the date of Exhibit 4?

A: Well, the date is 4/02/81.

[69] A: All right. And that was created as a result of you initiating a personal history report?

A: Right. The document I submitted was dated March 19, 1981.

MR. SHEPPARD: I would ask that that be . . .

MR. MORRIS: I have got a copy here, I believe, if you want to mark it.

MR. SHEPPARD: Yes, just to complete the report.

MR. MORRIS: Yes, that's fine.

MR. SHEPPARD: We can have that be Doggett Exhibit 1.

THE CLERK: It would be A.

MR. SHEPPARD: A, okay.

THE COURT: Any objections?

MR. MORRIS: No, Your Honor.

(Defendants' Exhibit A received in evidence.)

BY MR. SHEPPARD:

Q: Now, that document causes communication only with NCIC?

A: No. This goes to DEA headquarters and is put in the NADDIS computer, which is the DEA computer, and NCIC and should go to TECS and other computers also.

Q: But you have no way of knowing whether that did?

A: Routinely it does. It caused this form [70] to be filled out for the NCIC, so I assume the other – it went in the other computers routinely, also.

Q: But we have no documents that reflect that that indeed occurred?

A: No.

Q: Okay.

A: But he was already in the TECS computer, from my earlier teletype, so . . .

Q: What is the TECS computer?

A: That is the Customs computer.

Q: All right. Does the Marshal Service have a computer?

A: I don't know.

Q: Do you see . . . okay.

THE COURT: You are referring to a TECS terminal.

MR. SHEPPARD: A terminal that says, Arrest these fugitives.

THE COURT: Well, but in what context? He is talking about different systems. TECS is one system; NCIC is another system.

MR. SHEPPARD: I understood that.

BY MR. SHEPPARD:

Q: TECS is Customs. NCIC is all law enforcement agencies that subscribe to the NCIC computer, correct?

A: Yes.

[71] Q: Do you know if the Marshal Service subscribed in 1980-82 time period to the NCIC computer?

A: Yes.

Q: Do you know if there was a capability when you, being the DEA, caused an input into the NCIC computer that there would be something that came out to the Marshal Service? If you know. This may be beyond your . . .

A: I don't know. But I do know the marshals routinely call me up and say, Hey, we're looking at one of your fugitives here – or, we're looking for one of your fugitives and he's not in NCIC; put him in NCIC.

That could have been what caused me to do this thing to begin with, because – for me to send this form in. And it probably was the marshals calling me and saying, You've got the guy in TECS and you've got him in certain lookouts, but you need to put him in NCIC.

Q: But you are guessing that?

A: I don't remember. I'm saying that that is probably what happened.

Q: And there is no document in your file where you documented contemporaneous with any such communication from the Marshal Service; is there?

A: No. It has happened on other occasions, though.

[72] Q: Okay. So, the policy of the DEA that you referred to was a policy where DEA exclusively sought fugitives for only a 30-day period?

A: Well, in our cases, if we – most of our cases, or a large percentage of our cases, we arrest and do a complaint. But when we go to the grand jury and warrants are issued, we just don't want to duplicate with the marshals getting the warrants at the same time we do, and for us to be out there duplicating effort.

So we notified the marshals in this case that we would handle making the arrests. Once there were fugitives in the case, or people we couldn't find, that's where routinely we then submit the forms and they're put in the computers. And we hope that anybody will turn them up at that point.

THE COURT: Why don't you – you can't make an NCIC . . .

THE WITNESS: Entry?

THE COURT: . . . entry yourself?

THE WITNESS: No, sir.

THE COURT: You just mail your forms to your headquarters, and they're responsible for doing it.

THE WITNESS: Yes.

THE COURT: Okay. And you don't know, when you mail a form up, whether there is ever an [73] entry made or not?

THE WITNESS: No, I just have to assume that there is. And occasionally the marshals will contact me and say, Hey, there is not – this guy is not in NCIC; you better resubmit the form or make a phone call, whatever you have to do to get him in there. And that happens.

THE COURT: This isn't the first, that's how I know all of this. This is not the first case. There are breakdowns.

MR. SHEPPARD: Okay.

THE COURT: Now, the marshal can make entries – right? – but not for your agency.

THE WITNESS: You know, I don't really know.

THE COURT: You don't know, okay. Well, we can find out when Deputy Carr testifies.

BY MR. SHEPPARD:

Q: Who apprehended Doggett in 1988; do you know that?

A: I know it was the Marshal Service.

Q: Do you know how long they had worked on finding him before they found him?

A: No.

Q: Have you ever utilized the technique of getting a Credit Bureau check on somebody to determine their whereabouts?

[74] A: Not to determine their whereabouts, but I have done credit checks on people.

Q: And as a result of that, you typically get addresses, where they work, where they live and other such . . .

A: 99 percent of the time I don't get anything on the people I check on.

Q: Well, but it is a technique; correct?

A: Yes.

Q: Now, why were these two local law enforcement officers from the State of North Carolina different than the US Marshal Service in trying to find Marc Doggett in March of 1980?

A: They were working in a DEA task force. And they were working with a DEA operation out of the DEA office in, I guess, Wilmington.

Q: So this is kind of a territorial-pride thing, in part?

A: No. I just didn't want the same effort duplicated. I didn't see any reason for a team of US marshals to be out looking for somebody and having a team of agents and police officers. Fine, if they're working together. The more the merrier, we love to have the help. But I didn't see any need in duplicating the effort.

Q: All right. Now, with regard to the visit of Mrs. Doggett, Marc Doggett's mother, [75] in March of '80, by these two local officers that were working on the task force with the DEA, did you communicate with them by telephone, which caused you to then prepare – well, let me withdraw that.

Exhibit 2, which is a DEA-6, was prepared by those – by the DEA office in the North Carolina office?

A: Yes.

Q: And that is how you learned about what you have testified to here today?

A: Yes, and telephone conversations with the two agents that went out and interviewed Mrs. – or Doggett's mother.

Q: And this is the – this is the agents that are referred to in Government Exhibit 2?

A: Yes.

Q: Did you prepare any written memoranda or documents that assisted you in refreshing your recollection, other than Government Exhibit No. 2, with regard to any such phone calls?

A: No.

Q: And Government Exhibit 2 is your best recollection of what you learned about it; would that be accurate? Or do you remember something separate and apart from Government Exhibit 2 that causes you to testify as you have here today?

A: Well, I've had conversations with Overton, [76] Agent Overton, and with Leonard Williams about this and about their knowledge of Doggett's mother.

Q: Right.

A: For instance, I think the report says that Doggett's mother is Venezuelan. Overton now says he remembers that she was Colombian; Leonard Williams says he knew she was Colombian, also.

Q: Well, did Williams go to North Carolina?

A: No. But he found correspondence and stuff on Overton – I mean, on Doggett at the time of his arrest, when he used the name Marcus Pinzon. He knew that that was . . .

Q: Where is that?

A: Doggett was using – or had paper work on him at the time of his arrest in Panama showing that he had recently made phone calls to the Bahamas, and that the name he used when he made the calls was Marcus Pinzon. He had receipts from the phone – they have storefront offices in Colombia and some foreign countries, where you go in and you make phone calls. And he had the receipt; it was in the name of Marcus Pinzon.

Q: If you are in Colombia, you usually use your mother's maiden name as part of your last name; don't you?

A: As part of it, but not as your last name.

Q: Well, have you . . .

[77] A: You wouldn't use the name Marcus Pinzon if your mother's last name is Pinzon.

Q: Have you ever seen these documents about which you've testified to that existed eight years ago? Have you ever seen what you are talking about?

A: I never saw the documents. They're referred to in agent – in the agent's report.

Q: Williams' report?

A: Report, yes, Williams.

Q: Well, so let me go back to my last question. Other than what is contained in Government Exhibit 2 with regard to the efforts in March of 1980 to arrest Marc Doggett in his family home in Raleigh, North Carolina, other than what is in that report do you have any knowledge, separate from that, that you can identify and where you got it and when you got it?

A: Yes. About three weeks ago I talked to Agent Overton, who is the person that went out and talked to Doggett's mother.

Q: Right.

A: He still remembers it vividly.

Q: Sure.

A: Because he remembers that the mother was Colombian and that she knew that Doggett had gone back to Colombia to get more cocaine.

[78] And she was upset by it and said she would help the agents catch him when he came back.

Q: Anything else?

A: And he still remembers all this. That's about all I remember from our conversation.

Q: Did you create any written documents as a result of that interview with Agent Overton in the last three or four weeks?

A: No.

Q: And I believe you testified that the reason that he was put in NCIC, in the latter part of '81, was as a result of learning somehow that it had not been put in NCIC?

A: Yes.

Q: But it wasn't intentional that you delayed it?

A: No.

Q: Okay. Now, you have identified a DEA-6 Agent Williams, who was the senior officer in the country of Panama during the 1980-81 time period; correct?

A: Yes.

Q: Which Exhibit is that, please?

A: Exhibit 5.

Q: And he refers, in Exhibit 5, to a written request to expel Doggett, written to the Panamanian authorities.

A: Yes.

Q: He didn't bother to send you a copy of that?

[79] A: No.

Q: You have never seen such a document?

A: No.

Q: And it also alludes to a returned written communication from the attorney general of Panama, 8/15/80. And you've never seen a copy of that?

A: It would be October 15, '81.

Q: I'm sorry. You've never seen that document?

A: No.

Q: And I believe you have testified there had been no attempts, for the reasons you heretofore testified, to seek to extradite Marc Doggett from Panama.

A: That is correct.

Q: And I believe you testified that Williams left Panama in July of '82.

A: Yes.

Q: Who took his place?

A: I'm not sure, I think the person's name is Arthur Sedio. But I'm not sure.

Q: Do you have any evidence or recollection that you ever communicated with Arthur . . .

A: Sedio.

Q: . . . Sedio about Marc Doggett?

A: No, I never did.

Q: So would it be accurate for me to assume [80] that from July of '82, when Williams left Panama, really

that was – until you went to Panama in '85, I believe you said, August '85, there really wasn't much to do about this?

A: No. I really assumed that, in a foreign country like this, the guy would get a 15-year or 10-year sentence and serve it. I had no way of knowing, until I checked, that he was out and gone in less than a year.

Q: And you didn't check; did you?

A: No.

Q: Because of the assumption?

A: That is correct.

Q: And let me hand you what has been marked as Doggett Exhibit B, C and B. That is B, and then would you tell me what that is (tendering)?

A: Exhibit B is a DEA-6 by me. It's a fugitive status report dated January 16, 1984, where I say fugitive Marc Gilbert Doggett is presently in custody in Panama. The Panamanian authorities have been requested to expel Doggett to the United States to stand trial in this case when he is released.

Q: And what was your source of information in preparing that DEA-6?

A: My previous information from Leonard Williams.

Q: Which was, at that point, two years old?

A: Yeah. Well, actually – yeah, three years old almost, going on . . .

[81] Q: Three years.

A: Two years, two-and-a-half.

Q: All right. Now, let me hand you what has been marked as Exhibit C.

THE COURT: Do you have any objections to these coming in?

MR. MORRIS: No, Your Honor.

THE COURT: B will be admitted. Have you seen C and D, also?

MR. MORRIS: I'm not sure which they are. I probably have, if they are what I think they are (perusing). Yeah, I gave those to him, Judge.

THE COURT: Any objections?

MR. MORRIS: No.

THE COURT: Okay. C and D will come in, too, when they're offered.

(Defendants' Exhibit B received in evidence.)

BY MR. SHEPPARD:

Q: Would you tell the Court what Exhibit C is?

A: It's the same report dated July 18, 1984, same information in it. I think these reports are supposed to be written every 180 days; so it's about six months later.

Q: All right. And you had relied on the [82] previous information, from three years prior, when you had learned what you learned from Agent Williams?

A: Yes. As a matter of fact, when I got to Panama and checked with the Panamanian authorities, my recollection is that they didn't know he was out. The enforcement people put people in, they might get a ten-year sentence and they might pay their way out or go out the back door of the jail 30 days later. I've had that happen to me in cases down there.

Q: And I would love to do war stories with you, but we don't have time today. You don't know that to be – have anything in the world to do with Marc Doggett, though, do you?

A: Well, I don't believe that the enforcement people, the people who arrested him, knew that he was gone or . . .

Q: Okay. Well, let me ask you to identify Exhibit D (tendering).

A: Exhibit D is the same report, a fugitive status report dated March 10, '85.

Q: And again, you did nothing to – except to rely on the information

A: The previous information.

Q: . . . you had gotten from Williams several years prior, to initiate that report?

A: Yes.

[83] Q: Now I would like to talk to you, if I could, about this policy of destroying active files of the DEA in foreign countries. Is that really the policy of the DEA, that periodically they just destroy the office and start a new one? or what is the setup?

A: No, I wouldn't say active files. But if there is nothing happening in a case within a certain amount of time, the file is closed and it's destroyed.

Q: Is there any effort made to determine whether it is, indeed, an "active" file? That is to say that there is a fugitive on the other end of that file, that the information in that file could be utilized to exercise due diligence of apprehend that fugitive.

A: I'm sure there is an effort made to . . .

Q: What effort, if any, can you tell us was made with regard to Marc Doggett?

A: I don't know what effort was made. But I know there was no file when I got there in '85.

Q: All right. And presumably, from your communication with Williams, he told you there was a file when he left in '82.

A: Well, I didn't specifically ask him if there was a file. But I certainly assumed that there was, you know.

Q: I mean, he's creating DEA-6s . . .

[84] A: I have the stuff that he wrote that was sent to Jacksonville. But I don't have everything that he wrote that would have gone into the file there in Panama.

Q: And we don't have any way of documenting this so-called demand to expel Marc Doggett; do we?

A: Yes. It is in his DEA-6, and he recalls the letter.

Q: Does he recall what he did with the letter?

A: Well, he would have sent the letters. But then those copies would have been, and the stuff he received

would have gone into the Panama file. I wouldn't necessarily have gone into the file in headquarters or a file in any other place.

Q: When you were – or, when Williams was the resident agent in charge of the Panama office, to whom does he report state-side?

A: Well, at the time he was there, he probably reported to a regional office that was in Caracus, Venezuela. It's been changed now. And we report straight to Washington. But in the past, they had a regional officer there in Caracus. And that has been scaled down.

Q: Was any check ever made by you or others, to your knowledge, of the existence of any of these documents in the regional office in Caracus, Venezuela?

A: No. That office has been – the [85] regional office has been closed. And now there is just a much smaller one-,or two-man office there, so . . . and I know, from my own experience, an incoming letter would be stuck in the file there in Panama. But it would not be copied and sent to a headquarters' file.

Q: All right. What – when Williams was there, and maybe it was the same when you were there, where was DEA's office vis-a-vis the State Department or this consul that you've talked about? Is it in the same building?

A: No, the consul is two blocks away.

Q: And you have testified that it's typical, when an American citizen is in custody in Panama, that they communicate with the State Department; and they'll go down there and talk to them.

A: Yes.

Q: Help them out, because it's a serious situation in terms of civil rights.

A: Yes.

Q: The conditions of incarceration in Panama are horrendous, from your knowledge; are they not?

A: They're a lot tougher than they are here.

Q: And from your understanding, from being there for a period of years, that's why the State Department goes down there to see [86] people that are locked up that are American citizens; correct?

A: Yes. And that, again, is why I didn't think it was unusual for some – for an American citizen, be captured in a foreign country, to spend five or ten years or longer. It didn't seem unreasonable at all to me.

Q: Well, by the same token, you have been abroad for the DEA for years. And it's likewise not totally unbelievable that people get out in two days, two months, eight months or a year.

A: When they're US citizens, normally they serve longer than they would were they a Panamanian arrested with the same amount of drugs.

Q: Would you answer my question? You know – do you not? – from your experience, that American citizens have been released from foreign custody in less than five to ten years?

A: I know that now, as a result of having been there. But I didn't know that prior to going.

Q: Well, did you ask Williams what his experience was with regard to that?

A: We discussed it. I can't remember now what his response was. But my impression certainly was that he was going to spend a long time in jail in Panama.

Q: Well, isn't it true that the State Department, once they locate an American [87] citizen in custody in Panama, makes periodic and frequent visits to that person?

A: I know they do initially. I don't know what kind of follow-up they have and all that.

Q: Well, to your knowledge, has anybody talked to anybody from the State Department about Marc Doggett?

A: We have been trying to find a person to talk to.

Q: I'm talking about back between – during the time he was incarcerated and for the next four or five years later, when they are reporting that he is still in custody there.

A: Williams, Leonard Williams had some contact with the consul and knew that Doggett was also having contact with them. But, you know, he can't remember who – exactly who it was. He knows it was one of two people.

Q: But Doggett was known to the State Department personnel that were there at the time that Williams was there, from your conversations with Williams?

A: Yes.

Q: How about with his successor? Did he tell you that he knew?

A: No.

Q: And that would have been simply because Marc Doggett wasn't in the custody of the Panama government when Williams' successor even got there; was he? He had already been released.

[88] A: I don't know when he was released.

Q: Do you read anything in – excuse me. If I asked you to assume that . . . well, you testified that Williams left Panama in July of '82.

A: Yes.

Q: If I told you that Marc Doggett was released from custody on July 15, 1982, from the custody of the Panamanian government, would that assist you in telling us whether maybe the departure of Williams had something to do with this falling through the cracks?

A: Well, yes, I believe you when you say he left on July 15 of '82, Doggett got out. But I don't think Williams' departure had, you know, anything to do with it falling through the cracks. I don't necessarily think that anyone would have told Williams he had still been there.

Q: Okay. Now, as a matter of fact, you know that he was released on July 15, 1982, as a result of your conversations with Mr. Morris, who in turn had conversations with the State Department about documents they're looking for right now.

A: No. We learned it because you, just this morning I believe, gave Mr. Morris a copy of Doggett's passport. I haven't looked through it yet, but I've heard you refer to

this date. So I'm assuming that is the date [89] he was released from jail in Panama.

Q: Well, has Mr. Morris told you about his communication with the State Department to the effect that Marc Doggett was released on July 15, 1982, per an order of the 6th district court in Panama? In the last two or three days, has he told you that?

A: No. I didn't know that, no.

Q: So he didn't tell you either that the State Department document apparently says that Doggett's plans upon being released from the Panamanian authorities is to travel to Colombia? You didn't know that?

A: I just assumed that those were his plans, because I also assumed that he knew of the warrants in the United States.

Q: Well, let me ask you this: There is no prohibition between the DEA communicating with the State Department personnel in the country of Panama about US citizens that have warrants for their arrest, who are in the custody of the Panama authorities; is there?

A: No, there is no prohibition. And it should have been done. It should have been followed up on, but apparently it wasn't.,

Q: So if the State Department knew prior to the date of Mr. Doggett's release, there would be no legal impediment for them going [90] two blocks down the street and saying to the DEA, This fellow is getting out two days from now?

A: They may have even done it. But if they did, they didn't document it. They didn't put it in the file and they certainly didn't notify me.

Q: And my question is: You know of no legal impediment to prevent that from occurring?

A: No.

THE COURT: Or illegal impediment.

BY MR. SHEPPARD:

Q: Or any impediment?

A: No.

Q: Unless the guy can't walk two blocks. And there are phones between the DEA and the State Department up the street two blocks; are there not?

A: Yes.

Q: How big is the city where these two offices are located?

A: Panama City if (pausing) . . . it's a big city.

Q: Can you give me your estimate? You lived there for – what? – two or three years.

A: I have no idea of what the population is. People are . . .

Q: Compare it to the size of Jacksonville, if you can.

A: Geographically, it's compressed into a [91] much smaller area. But the people are living, it's like a teaming city; it looks like ants crawling all over one another. They're living on top of one another.

Q: How many Americans are associated with the State Department and the DEA?

A: It's one of the largest embassies that the United States has, because it's – the Panama Canal is there and the canal zone, and the embassy oversees the operations of the canal and the military. And so there are a couple of hundred people there.

Q: Two hundred? Do you know how many there were in 1981?

A: There would have been more. Because when I was there in '85, they were phasing out the turning of the canal over to the Panamanians. So the American presence is being scaled down.

Q: You said that somebody from the embassy told you there was no extradition treaty between – by and between the United States of America in the country of Panama. Who told you that?

A: I have had a lot of conversations about –

Q: Just list them all. My question is . . .

A: The country attache, who was the head of DEA when I was there.

Q: I need to know their names.

[92] A: Thomas Hayes. The legate, who was the FBI representative when I was there, I can't remember his name. I had just numerous conversations, because I've dealt with the – with this issue dozens of times.

Q: And this was from 1985 forward that these conversations occurred, correct?

A: Yes.

Q: And you don't know, from these conversations, what the situation was in the 1981-1982 time period; do you?

A: I only knew what I was told, that no extradition existed between – for drugs between Panama and the United States.

Q: Did you ever ask an assistant United States attorney or a legal representative of the United States of America if there was an extradition treaty?

A: Well, I've testified in probably half a dozen cases around the country that there was none.

Q: Agent Driver, you and I have talked before and . . .

THE COURT: Is your testimony that there was no treaty, or just that they didn't use extradition proceedings?

THE WITNESS: My understanding was that the treaty that existed did not cover drug offenses and that there was no provision at all to extradite US citizens from Colombia for drug offenses.

[93] THE COURT: We are talking about Panama.

THE WITNESS: From Panama back to the United States.

BY MR. SHEPPARD:

Q: Did you ever ask a lawyer for the United States of America if what you had been told by these non-lawyers was true?

A: Well, I'm trying to think if any of the people I talked to were lawyers. I dealt with so many people in the US Embassy. Most of them were just – were State Department people.

Q: I understand.

A: I don't think they were lawyers.

Q: So you have never conferred with a legal advisor for the DEA or the United States of America with regard to that, that you can recall?

A: That's true.

Q: After the visit by the North Carolina local authorities who were with the DEA task force, was any contact ever made with Marc Doggett's family again? That is, his mother or father.

A: If it was, it was done by those same officers. And I don't know.

Q: You have – you have no evidence that that ever occurred?

[94] A: That is correct.

Q: So far as your file reflects and your knowledge of this matter is that on March 24, 10-, or excuse me, in March of 1980 two people went to Marc Doggett's parents' home and he was not there. And thereafter you have

no information whatsoever that any representative of the United States of America ever recontacted those folks. Would that be accurate?

A: I don't have any information that they were recontacted.

Q: All right. Did you learn the Doggettes had lived at this location for a period of years, at that time.

A: No. I only know what is in the report.

Q: Did you learn that Mr. Doggett's father was a Ph.D. physicist and head of the physics department at the University of North Carolina at that time?

A: No.

Q: This "request for expulsion," is that – should I be putting quotes around that? Is that a legal proceeding? or is this more of an informal arrangement between Panama and US . . .

A: I think it's more informal. They just determine that the person is undesirable and they don't want them in the country, and they expel them.

[95] Q: And they can do that in two days, rather than wait until he completed his sentence: correct? –

A: They could do it whenever they choose to.

Q: Right.

A: But if they decide they want to put him in jail for violating their laws, that's their prerogative.

Q: Yes, sir. At the same time, during your experience in Panama, you were able to prevail on Panamanian

authorities on a time or two, if not more, to immediately expel someone who you had a warrant for, so you could get them into the United States and save them the expense of incarceration.

A: Yes. But oftentimes, or most times, these people hadn't broken a law in Panama. They were just a fugitive from the United States.

Q: Most times. But there were times when they had done both?

A: Yes.

Q: Could I see Exhibit 6, please?

A: (Witness tendering document.)

Q: Thank you. Exhibit 6 is a DEA-6 prepared by yourself, I believe, on . . .

A: April 26, 1983.

Q: '83, okay. And that refers to the information you received – does it not? – on September 21, 1981.

[96] A: Yes.

Q: And I didn't – I think that you were asked why the gap, or you made a comment about why a year and nine months between learning something and then writing a report about it.

A: Well, we're supposed to write the reports at regular intervals. But we don't always do it. Some supervisors require it and some don't. And I think I had just gotten a new supervisor, and he required it. And that's why I wrote it.

Q: Were you writing from other notes? or from memory? or what?

A: I'm sure it was from the notes that I had stuck in a work file.

Q: With regard to anything that has happened to Marc Doggett since – well, strike that. What is the last physical thing that you, on behalf of the United States, did to effect the apprehension of Marc Doggett? Can you pinpoint a date? That you did or caused to be done.

A: Well, it would have been this fugitive declaration prepared March 19th, 1981, that resulted in his going into – being entered into NCIC. I would assume that's the last thing, unless at some date subsequent to that I gave a list to the marshals of fugitives, or something. But I don't think I did, I [97] can't remember. I don't know. I don't know what prompted their action.

Q: Okay. "Their," referring to the '88 action of the US Marshal Service?

A: Yes.

THE COURT: When was he apprehended?

MR. SHEPPARD: September 15, 1988.

MR. DOGGETT: September 5.

MR. SHEPPARD: September 5th, I'm sorry.

THE COURT: Of 1988?

MR. SHEPPARD: '88.

THE COURT: I think something happened on November 8, 1988, that may have prompted all that work.

MR. SHEPPARD: Sir?

THE COURT: I said I think something happened on November 8, of 1988 that prompted the marshal acting, commonly called an election.

MR SHEPPARD: No, he was arrested September 5th – oh, so they . . .

MR. GLASS: It was anticipation, Judge.

THE COURT: I think if you ask the marshal, they formed task forces during the summer . . .

MR. SHEPPARD: No, I understood that.

THE COURT: . . . to show that they were out picking people up.

MR. SHEPPARD: I see what you're saying, all [98] right.

THE COURT: People in office can do things like that.

MR. SHEPPARD: Maybe they can extradite people even.

BY MR. SHEPPARD:

Q: Well, let me re-ask: In 1985 you went to Colombia.

A: Yes.

Q: And upon arriving . . .

A: Well, to Panama.

Q: Panama, I'm sorry; thank you. And when you got to Panama, this case came back to your mind somehow?

A: No, it had been on my mind. I mean, I had to do these periodic status reports. And I don't recall, but I may have called Panama and said, you know, Can you check on this guy? And probably they told me no, for one reason or another.

Q: Well, you don't . . .

A: So one of the first things I did when I got there was to check to see if he was still in jail and to see you know, Hey, why don't we get him out and send him back, see if I can further this case, see if he knows where Ortiz and Moreno were.

So that's one of the first things I did was check. And I found out he had been long [99] gone, but nobody knew exactly when.

Q: What, if anything, did you do as a result of that action in 1985?

A: I don't remember if I wrote something to this file. I don't see anything in the file, so apparently I didn't. But I should have written something to this file.

Q: But there is nothing in it; is there?

A: No.

Q: And you have no recollection of communicating with anybody anywhere about it? I mean, it is one of those things you learn and you move onto something fresher, I reckon; would that be accurate?

A: I don't remember what I did, if anything.

Q: And that is because of the passage of time that your memory has faded; would that be accurate?

A: Yes.

Q: This information you received from Jerry Smith who, I believe you testified, was the head of the NCIC headquarters . . .

A: I don't know if he's the head of it or not. He works there.

Q: He is in there, I'm sorry. He says that it is possible to query all 50 states, and this is a recent innovation, to determine driver's license information.

A: Well, he says it's possible. I don't [100] know if it's a recent innovation or not.

Q: I thought he had said it was recent, okay. You said that he discouraged it except for – he discouraged it as to routine matters.

A: Yes.

Q: Is looking for a fugitive to give him his constitutional right to a speedy trial a routine matter?

A: Checking for fugitives – in this case, I believe it would have been a routine matter. I believe that Doggett was living out of the country and that he was intentionally avoiding coming back to the United States.

Q: But, admittedly, you didn't check with the State Department people when you got to Panama to learn what they are now telling us that they knew he was released and when he was going to be released.

A: No, I didn't because my conversations with the Panamanian authorities led me to believe that he was released without their even knowing that he was going to be released.

Q: Now, in this investigation, your undercover investigation that you referred to, you have testified, I believe, that the activities were investigated from from November of '79, through January '80.

A: Yes.

[101] Q: The indictment alleges a conspiracy from August of '79. Could you be – were you involved only from November? or could you have been off for a few months?

A: The informant was originally approached by Fabio Moreno to get into this operation and was – the informant was living in the United States and was flown down to Colombia in August of '79, and asked to participate in this smuggling operation.

And he came back to the United States and thought it over for a long time, trying to decide whether to do it or not. He met Doggett and some of the other people and tried to – before he decided not to enter it and to come work with me.

Q: So you actually did come in after he had been investigated?

A: I got involved in November.

Q: Okay.

A: And that's when the investigation started. But he had been trying to decide whether to get involved in the conspiracy or help law enforcement for several months.

Q: So from August until September – I mean, August until November, it was the activities of the confidential informant, now known to us from reading the Bate sheets or the law books, is Ivan Cifuentes; correct?

A: Yes.

Q: And it's about – the matters and things [102] that occurred from August until November, before you got in it, are still part of the charges that Marc Doggett is expected to defend; correct?

A: Yes.

Q: Where is Ivan Cifuentes?

A: He was put in the Witness Protection Program.

Q: When is the last time that you knew of his whereabouts?

A: I met him, I went out to California on another case this past summer. And I ran into him out there. And we spent a couple of hours together.

Q: That is the summer of '88?

A: Yes.

Q: And since September of '88, has Ivan Cifuentes been looked for by the authorities.

A: Not to my knowledge.

Q: Okay. So insofar as we sit here now, he is missing in action?

A: Yes.

Q: And during the course of this investigation numerous tape-recorded conversations between and among the confidential informant, yourself and the co-defendants were created; correct?

[103] A: Yes.

Q: Seventeen in number?

A: I believe so, yes.

Q: And where are those 17 tape-recorded tapes, as we sit here now?

A: They're also missing in action; they're lost.

Q: It would be accurate for me to assume – would it not? – that due diligence has been exercised in trying to locate the tape and Ivan Cifuentes?

A: Yes. But I haven't given up on locating Cifuentes. I think we will find him soon.

THE COURT: I thought you said he was in the Witness Protection Program.

THE WITNESS: He was. And he withdrew from the program, but he was still maintaining contact with the Marshal Service. And they seem to think that they'll be able to find him. And he tried to contact me and Jerry Carr, the other agent that was involved in this case with me. And that's where I ran into him, was in Jerry Carr's office, so . . .

Q: Agent Carr is formerly with the Jacksonville office?

A: Yes.

Q: And he is now located where?

A: Santa Barbara, California.

Q: You testified about the various [104] capabilities of the NCIC computer and its inability to accurately perform if there are – a middle initial is off, I believe you used as an example, or a digit in a birth date, or what you have.

A: Yes.

Q: But yet you don't have access to an NCIC computer: do you?

A: We can tap into it through the NADDIS computer. We can't put things in it, but we can get things out of it. So we can check to see if somebody is wanted through NCIC, through our other computer.

Q: All right. But it is not something where you sit at a keyboard and do that on a routine basis; is it?

A: No.

* * *

CROSS-EXAMINATION (Continued)

[109] BY MR. SHEPPARD:

Q: Looking at the exhibits, can you tell me the date that the North Carolina authorities went to Doggett's parents' home?

[110] A: On March 14, 1980 – no. March 18, 1980.

Q: And they learned that he had left his parental home four days prior?

A: Yes.

Q: And other than the DEA policy – well, strike that. There were arrests made in this case on the 22nd of February; correct?

A: Yes.

Q: The indictment was public knowledge at that point?

A: Yes.

Q: Is there any reason why no one went – well, you had learned of Marc Doggett's parental home from his investigation – correct? – and where he was from.

A: No. I had gone to North Carolina and I met him in an undercover capacity.

Q: In Raleigh, North Carolina?

A: Yes. And there was a surveillance. But he was not living with his parents at the time; he was living in an apartment. So when the agents went back to arrest him, I would assume they went to that apartment first, couldn't find him and then started making efforts to locate him through his family.

Q: All right. But you had his driver's license in your possession prior to the indictment; didn't you?

A: Yes.

[111] Q: And it had his regular name and address on it?

A: Yes.

Q: In Raleigh, North Carolina?

A: Yes.

Q: Was there any reason why you delayed – why there was a delay from the 22nd of February until the 18th of March to go to the last known location of this fugitive?

A: Just, there was the – I don't know what I was doing in the interim, no. But this was the first time I was able to coordinate it and get the North Carolina authorities to go arrest him and to get everything happening. I don't know what caused the delay, but I'm sure it was either something I was doing or something . . .

Q: Let's not speculate. If you don't know, you don't know.

A: . . . or something North Carolina was doing. They don't just drop everything when I call.

Q: Well, when did you call them?

A: I don't remember. I was coordinating with them from October '79 on; I had numerous telephone calls with them. They knew of the investigation, and they were looking at Doggett and these activities in North Carolina as a result of my investigation.

Q: And that was because two other [112] co-defendants, that have been tried and convicted, Barnes and Riddle, were from Raleigh, North Carolina, also?

A: Yes.

Q: And it would be true – would it not? – that not only the DEA task force, but the DEA resident office in

Raleigh, North Carolina, had been an active participant in this investigation for a period of from October of '79 until February of '82 – I mean, '80.

A: Well, what we're talking about is the DEA office out of Wilmington, but they work with these state local officers in Raleigh, who actually went by to do the arrests. There is no DEA office in Raleigh.

Q: How far is Wilmington? Right down the road; isn't it?

A: No, no. It's probably at least 100 miles.

Q: All right. Do they have a US Marshal Service in Raleigh, North Carolina?

A: I don't know. Probably.

Q: There is a federal courthouse there; is there not?

A: I believe there is, yes.

* * *

RE-CROSS EXAMINATION

[122] Q: Agent Driver, who was the agent in the Jacksonville office that this file was turned over to after your departure?

A: I don't know.

Q: You now have the DEA file relative to Marc Doggett; do you not?

A: Yes.

Q: And that would be the file that was turned over to whomever; correct?

A: Yes.

Q: And there is no activity reflected by a review of that file after your departure – was there? – until September of '88.

A: Sheila Smith wrote some status reports. And as a matter of fact, she was contacted in 1987 by our office in Santa Domingo. And they requested information on Luis Ortiz because they believed that he was living there.

Q: I'm talking about as it relates to Doggett, I'm sorry.

A: Oh, okay. Well, Sheila Smith and Greg Thrash subsequent to that. So I believe it's been – it first went to Sheila Smith and then to Greg Thrash.

Q: But there is no indication of any activity as it relates to Doggett since your departure, [123] from your review of that file, until his apprehension on September 5th of '88?

A: Well, all of the reports subsequent to my leaving make reference only to Moreno and Ortiz; whereas, prior to that they also included Doggett. So I had to telephone and tell them that Doggett was out of jail, otherwise he would have been included as – but I don't see anything saying that he is out of jail in Panama and believed to be in (pausing) . . . so there is nothing further about Doggett at all. The file only refers to Ortiz and Moreno.

* * *

DIRECT EXAMINATION

[164] BY MR. SHEPPARD:

Q: Agent Driver, over the noon recess I was looking at a document. I want to refer you to Government's Exhibit 1. You had heretofore identified that; had you not?

A: Yes.

Q: What was – what do you recall you identified it as being?

A: It's a message put in the computer that was put in – well, I didn't actually do it, but I was there when it was put in, at the Customs office. And it goes to all Custom Service, INTERPOL, EPIC; and it puts Marc [165] Doggett on lookout as possibly going to be coming back into the United States, aboard an Eastern flight, carrying cocaine.

Q: All right. Now, stapled to that exhibit were two other documents – were there not? – that were not introduced, that are of the same ilk as Exhibit 1.

A: I see the two documents. I guess they were stapled to it, I don't know.

Q: All right. They are the same type documents; are they not? Customs documents.

A: Customs printout, yes.

Q: All right. Now, with regard to the last two . . .

MR. SHEPPARD: Which I would ask be introduced as Doggett Exhibit . . .

THE COURT: F.

MR. SHEPPARD: . . . F, and I'll make it a composite exhibit.

BY MR. SHEPPARD:

Q: . . . is it not true that those two documents are a request for the United States Office of Investigations of the US Customs Service to do a secondary search of Marc Gilbert Doggett if he comes through Customs?

A: Yes.

Q: And is it not also true that those two documents reflect that that request for a [166] secondary search of Doggett, who was known to be out of the country, if he came back into the country, were cancelled in 1980?

A: Cancelled in 1980?

Q: Yes, sir (indicating document to witness).

A: It says, Cancel date May 2, 1980. I don't know if they have an automatic date they cancel out of. But I certainly didn't give them that date to cancel it.

Q: The second – the second document reflects a cancel date of what?

A: September 19, 1980.

Q: Now, what is the secondary search?

A: It's when they're taken aside and really searched.

Q: And they pick that up from your passport that you present when you come through Customs?

A: Or unless they're put on lookout, like this. Yeah, they pick up the name from the passport; and then they're pulled out of line and taken someplace and searched.

Q: All right. And apparently you had requested Customs Patrol Officer Bob Harrell to – to make this computer . . .

A: Yes.

Q: . . . entry. And it would appear – would it not? – that the request – insofar as the documents are concerned, the request for the secondary search terminated in September – the last one was September of 1980?

A: Yes.

* * *

REBUTTAL

[241] BY MR. MORRIS:

Q: Agent Driver, did you, this afternoon, have a conversation with Mr. Henderson, legal counsel with the State Department?

A: Yes.

Q: And did he read to you, over the phone, a couple of cables which he apparently had wired or faxed to us since that time?

A: Yes.

Q: I'd show the agent Exhibit No. 9. Is that the – did those appear to be the cables that he read to you over the phone?

A: Yes.

MR. MORRIS: Any objection to admitting No. 9 into evidence?

MR. SHEPPARD: No. I'd move it into evidence.

THE COURT: No. 9, any objections?

MR. GLASS: No, sir.

THE COURT: No. 9 will be admitted. But it's a Government's exhibit, not a defendant's exhibit.

MR. SHEPPARD: The defendant adopts it.

(Government's Exhibit No. 9 received in evidence.)

[242] BY MR. MORRIS:

Q: Agent Driver, I guess the one – there's two cables there. Read the one on top first and, if you will, just the part marked Format Update – or, pardon me . . . which one do you have on top?

A: The subject's arrest release of Marc Doggett. That's on top.

Q: All right. And aside from apparently some standard format, as far as who it's to and from, et cetera, is there a section called format update?

A: Yes.

Q: And what does it say in that section?

A: Number one, it's referring to Paragraph 10 of some previous correspondence. It says (referring to document): Marc Doggett was released from jail on July 15, by order of 6th district court.

Q: What does Paragraph 2 say?

A: Paragraph 2 . . .

THE COURT: That was '81? or '82?

THE WITNESS: '82. Paragraph 2, it says (referring to document): Para 21 – meaning, referring to Paragraph 21 of some previous teletype – Doggett informed "Con-Off" that he plans to travel to Colombia. No further action contemplated in this case. Signed Blake.

* * *

[130] RALPH D. CARR, having been produced and first duly sworn as a witness on behalf of the Government, then testified as follows:

DIRECT EXAMINATION

[133] BY MR. MORRIS:

Q: With regard to this warrant, if you had run accross Mr. Doggett or Mr. Ortiz you would have arrested them?

A: That's correct.

Q: Did you make any active search for them at any time?

A: No. The only thing that we have done [134] since I took over the fugitive section, periodically we would purge the warrants and contact the agencies that were responsible for the warrants to make sure they were in NCIC, or if we ran them in the comptuer and found out they weren't in NCIC they asked why they're not.

If the case becomes an older case, to check with the US Attorney's Office to see if they want to proceed, or with the responsible agency to see if they're still going to proceed. And if they're not, see if we can get the case either dismissed or the warrant withdrawn.

Q: Those activities, then, are making sure your warrant files are still current?

A: That's correct. But there are times that we do work the warrants when our other cases are at a lull.

Q: And how do you go about doing that?

A: We'd contact the agencies to see if they have any problem with us working the warrant.

Q: In this case, in either one of these cases, Mr. Ortiz or Mr. Doggett, was that done by you or your office?

A: Not until 1988.

Q: And there was no other contact before that?

A: There was periodic contact to see if the case was still open or why they weren't in NCIC. And I think Mr. Ortiz was not in NCIC for a period of time.

Q: Are you sure it's Mr. Ortiz? or Mr. Doggett?

[135] A: Mr. Doggett was in NCIC; Mr. Ortiz I don't think we had a date – or, DEA didn't have a date of birth for awhile. At least there is a notation here there was no date of birth available. If there's no date of birth, then it can't be entered into NCIC.

Q: It can't be entered just with a name and not a date of birth?

A: That's correct; it cannot be entered.

Q: At what time did your office or the Marshals Office become an active participant in looking for these two persons? How did that develop?

A: At the beginning of September there was a program started for the Gulf Coast, from Texas to Miami, called WANT II, which is Warrant Apprehension Narcotics Teams. The Marshal Service had set up in strategic areas from Miami to Texas looking for DEA fugitives or narcotics fugitives. They didn't care if they were state or federal.

Q: Was this a follow-up to an earlier program called WANT I?

A: That's correct.

Q: And what region did WANT I concern?

A: WANT I worked the West Coast, San Francisco; even though a lot of the cases originated back into Florida.

THE COURT: Is that program still going on?

[136] THE WITNESS: WANT II is over, within the past three weeks, four weeks.

BY MR. MORRIS:

Q: And what types of investigative effort were placed in WANT II in an attempt to locate fugitives?

A: They brought in agents from different parts of the country. In this area here, we had approximately 12 people working DEA fugitives. We were assigned DEA

fugitives, for the Jacksonville area from Orlando, Tallahassee, Pensacola and Jacksonville cases, and any leads that may come up from the other areas that had satellite sights.

Q: And how was Mr. Doggett located?

A: Mr. Doggett was located through a credit check.

Q: Do you know offhand whose agency was – who the credit check was with?

A: One of the deputies that worked on the team was out of the Savannah office; and his office has a credit machine in the office itself. So as a routine, when we started up the operation, we wanted to see what was available to us, so we'd run the name automatically through and get a credit check on them and see if there was any kind of activity on their credit. And in Mr. Doggett's case, there was.

Q: Jacksonville does not have such a machine?

A: We have an area – we don't have a machine in the office, no. We have a Credit Bureau that we can go to and pay each time we check, make a credit check, on a person. It's not done on a routine . . .

Q: Is that a practice you normally use on a person if you don't know where they're living?

A: It's not done on a routine; we do it periodically. Basically, when you're working on a fugitive warrant, you're flying by the seat of your pants. You look to see what other agencies have done; and whatever ideas you come up with, you just try anything you can to try to get ahold of the person.

Q: And that credit check is what eventually led to locating Mr. Doggett in Virginia?

A: That is correct.

Q: And you had other marshals make the arrest in Virginia?

A: That is correct. The lead was sent back to El Paso, Texas, where the headquarters was. And headquarters in El Paso and EPIC Center had sent the lead to Virginia to effect the arrest. I think a driver's license check was done on him, also, within a three-, or four range state.

Q: After the credit check?

A: That's correct.

Q: Prior to that, you had no information Mr. Doggett was living in Virginia?

[138] A: That's correct. Looking through the file, the only information was that at one time he was in custody in Panama.

* * *

CROSS-EXAMINATION

[142] BY MR. SHEPPARD:

[143] Q: When did WANT II start?

A: September 1988.

Q: What day in September, if you know?

A: I'm not sure. I think it was around the 1st.

Q: The lst. Marc Doggett was arrested five days later?

A: That's correct.

Q: And what it really took was going to a commercial Credit Bureau computer terminal and plugging his name into it?

A: That's what it took for Mr. Doggett. It took a lot . . .

Q: That is all I'm asking about is Doggett.

A: That's correct.

Q: And that took . . . what? How long did it take to get that piece of paper back out of the computer?

A: We probably had the information within an hour.

Q: And that information gave you his street address of his home?

A: I don't know if it gave the street address or not.

Q: Well, didn't it give you a street address that he was residing, at 11031 Thrush Ridge Road, in Reston, Virginia?

A: I don't know if the credit check gave it or the driver's license check give it. I'm not sure.

[144] Q: All right. And you learned what his driver's license was. A valid driver's license in the name Marc Gilbert Doggett . . .

A: That's correct.

Q: . . . in the State of Virginia. You learned where he worked; you learned the make and tag number of his vehicle.

A: Correct.

Q: And you learned who his wife was.

A: Correct.

Q: Delores. You learned where he worked?

A: Correct.

Q: And you did that in 30 minutes?

A: I don't know if that was all done in – the credit check was done in 30 minutes. If it came back on the credit check, yes.

Q: All right. Well, do you have the credit check?

A: No.

Q: Who does?

A: Probably Savannah; they run the check. And they gave us the information over the phone.

Q: And then you type up this document that's been transmitted to . . .

A: Whoever worked the case, yes.

Q: . . . to El Paso?

[145] A: That's correct.

Q: And, indeed, agents were then dispatched by El Paso headquarters to Reston, Virginia?

A: Well, El Paso sent the teletype to Virginia. And the photograph was sent up – an old photograph, I think it was off of an old North Carolina driver's license, was sent up to Virginia.

Q: Now, from February 22, '80, until September 1st, '88, what activity occurred as it relates to Doggett by your office, your agency?

A: Basically just checking to see if the case was still active.

Q: Who did you check with? when?

A: DEA.

Q: Who? Who checked? when and where? What did you find out?

A: (Witness perusing documents). In 1982, I checked. Notified by INTERPOL that subject was arrested in the country of Panama for possession of narcotics.

Q: Who did you learn that from?

A: Huh?

Q: Who did you learn that from?

A: INTERPOL.

Q: Can I look over your shoulder?

A: Sure.

[146] Q: Now, what is INTERPOL?

A: INTERPOL is an agency out of Paris, France, that is basically an international police force, as far as ahead. Different law enforcement agencies in different countries

input information into INTERPOL. And INTERPOL disseminates it to those law enforcement agencies inquiring about it. So it came from the State Department basically.

Q: And that was some – approximately two years to the day, less four days, from the time you got the warrant that that first check was made?

A: Uh-huh.

Q: And you didn't check with DEA; you checked with INTERPOL?

A: I was – no. I was notified, notified by INTERPOL.

Q: All right. Now, INTERPOL would know of this interest of your agency by virtue of . . . what?

A: The – the NCIC entry would show the agency that put it in, which would be DEA. But it also shows the agency that's holding the warrant.

Q: Which you were the custodian of?

A: That's right, that's correct.

Q: So this international police force would have had the information about the warrant for Marc Doggett whenever he was put into NCIC?

[147] A: That's correct. They pull – they can purge that information. The state people can purge it also.

Q: Okay. What next did you do, or your agency?

A: The same day, I requested a copy from Panama from DEA – a copy of the report to Panama from DEA that subject be expelled from the country.

Q: Well, how did you learn that that was even in existence?

A: Well, I contacted DEA after . . .

Q: Okay. Who did you contact?

A: I didn't put the name down. I just contacted the agency.

Q: Okay. They told you about this information?

A: Then they told me, yes, they had the same information that I had.

Q: Right. Did you ever get that item that you requested?

A: No, no.

Q: That was the item – the expulsion request?

A: That's correct. 1986, the handwriting looks like Dick Fisher's. There's nothing to report; it's status quo as far as is concerned on that.

Q: All right. What else do you have in your file on Doggett?

A: Photographs, fingerprints of his last arrest.

Q: That was from the 9/05/88 arrest?

[148] A: That's correct. And a 129, which is a copy of the booking sheet from the Marshals Service in Virginia.

Q: On this arrest, 9/05?

A: On this arrest, right. There also is a copy of his personal history.

Q: 9/05/88?

A: That's correct. A request to WANT headquarters to have a credit check done on him.

* * *

[193] DELORES DOGGETT, [194] having been produced and first duly sworn as a witness on behalf of Defendant Doggett, then testified as follows:

DIRECT EXAMINATION

BY MR. SHEPPARD:

Q: And what is your address, Mrs. Doggett?

A: 11031 Thrush Ridge Road, Reston, Virginia.

Q: And with whom do you live at that residence?

A: Marc Doggett.

Q: When did you meet Marc Doggett?

A: I met Marc in the fall of '82, October or November.

Q: Of 1982?

A: Uh-huh.

Q: And where was that?

A: In Pittsburgh.

Q: And at that time where did Marc live, if you know?

A: He lived in North Carolina.

Q: With whom?

A: I think his grandmother is who he lived with.

Q: Could you speak up? It is hard to hear you.

A: I think his grandmother.

Q: Did – after you met Marc in the fall of '82, could you describe your relationship? Were you boyfriend/girlfriend?

A: Uh-huh. Oh, yeah. I mean, we started dating right away, as soon as I met him.

Q: As soon as you met?

[195] A: Right, as soon as we met. And it was, you know, it was hard because he lived in Raleigh. So then, you know, just one thing lead to another and we – we got married. We moved to Virginia and we got married.

Q: When did you get married?

A: We got married in October; October 22nd, 1983.

Q: '83?

A: Uh-huh.

Q: Do you recall when you met Mrs. Doggett, who just came off the witness stand?

A: Uh-huh.

Q: When?

A: It was about two weeks after that.

Q: After you got married?

A: Uh-huh.

Q: And you indicated that you all had moved to Reston, Virginia, prior to your marriage.

A: Right.

Q: And I kind of read in your answer that that may have been because it was . . .

A: We moved to Reston. Marc wanted to move to Raleigh; he wanted to live in Raleigh. We knew we were going to get married. He wanted to move to Raleigh; I didn't want to move there because, you know, I didn't know [196] anybody there.

My sister lived in Virginia. And it was halfway between Pittsburgh and Raleigh; it was the perfect place. So that's where we decided to move, to Virginia.

Q: And when you moved to Reston, where did you first reside?

A: Sycamore Apartments. We lived there for a year – from October '83 to February '84. And in February, we bought a townhouse.

Q: Bought a townhouse?

A: Bought a townhouse in Reston, lived there from February '84 to February '87, where we bought another townhouse in Reston. And we just moved there last February.

Q: Sold the other one and . . .

A: Right.

Q: . . . moved to a different place? Now, when you bought your first house – a townhouse is like buying a house, I guess?

A: Yeah.

Q: How did you – did you take title to that? Do you understand what I mean by take title?

A: Whose name was it in?

Q: Yes.

[197] A: Both of course, my name and Marc's name.

Q: How have you known – what do you know Marc by?

A: Marc, Marc Gilbert Doggett.

Q: Have you ever known him by any other name?

A: No.

Q: Have you ever known him to use any other name?

A: No.

Q: And you bought this first house in '8- . . .

A: 198-, well, '83, we applied for the, you know, the loan and everything. But we moved in there in February of '84 – or February '85.

Q: All right. And then you moved from there in '87, to your new house?

A: Right.

Q: How did you take title to your new house?

A: Same way. Both names, Marc and Delores Doggett.

Q: And during this period of time, what was Marc doing? From the time you married him forward.

A: When we first got married, Marc was going to school.

Q: Where?

A: At NOVA, Northern Virginia Community College.

Q: And how was he enrolled there?

A: As Marc Doggett.

Q: All right.

[198] A: And then we needed more money, so he got a job. He worked – he went to school in the day and worked at night.

Q: Where did he work?

A: He worked at George Mason. First he worked at the Army Times, the Times Journal or Army Times, whatever it is. He worked there for a while in the night. Then he got a job with George Mason in the night, and worked there for a while.

Q: What is George Mason?

A: George Mason University. He was computer operations manager.

Q: What was he – what course of study was he pursuing when he was going to school?

A: Computers.

Q: And these jobs that he had, what area were they in?

A: They were all related to computers.

Q: And when he worked at George Mason and for the Army Times, what name did he use?

A: Marc Doggett.

Q: And after he worked at George Mason part-time at night, he was going to school at Northern Virginia, what next occurred?

A: He started working for Advantage Courier.

Q: For what?

[199] A: Advantage Courier. They're a courier service in Herndon, Virginia. And he went from – worked full-time, he started full-time. So then he took classes in the night and worked full-time. He went from working full-time at night to full-time at day – in the day; it switched around. So he was still going to school and working.

Q: And when he worked at that job, what name did he use?

A: Marc Doggett.

Q: And then what – what next became of his spare time, or his time?

A: He doesn't really have spare time. He – Marc has always had two jobs. I mean, he's always – he started working at Advantage and he'd go to school. I don't mean two jobs, I mean he's always had a lot of stuff going on.

He was taking classes. He was working in the day, taking classes at night; then he started working – he was

taking one or two courses. And he started working for National Glass Association. But he worked for Advantage Courier as – like, he and his father worked for them as consultants. And he worked with Advantage part-time. So he's always, you know, he's always been busy. He [200] doesn't have very much spare time.

Q: Who does he work for now?

A: NGA.

Q: National Glass Association?

A: National Glass Association.

Q: What does he do there?

A: He's a computer – manager of computer operations.

Q: So I take it he has worked there for a period of years?

A: A year, one year.

Q: All right. And when did he stop working for Advantage?

A: He stopped working for Advantage just – you mean full-time or . . .

Q: At any – for five minutes.

A: Last week. Or, Friday was his last day at Advantage.

Q: Does he still attend school?

A: No, he hasn't.

Q: Did he complete any course of study?

A: Yes.

Q: What?

A: He got his degree in general studies. His Associates Degree, I'm sorry, in general studies.

Q: Now, during this period of time since '83, have you worked?

[201] A: Yes.

Q: And what has been your work?

A: When we first moved to Virginia, I worked for an executive search firm for a year. And then I got a job, in 1984, with BDM Corporation as administrative assistant to the vice-president in control. And I've worked – I work there now.

Q: And what level of education do you have?

A: Two years. I have an Associates Degree in executive secretarial courses.

Q: Have you – would you describe your living habits with Marc since you moved to Reston, Virginia, in 19- . . .

A: '83.

Q: . . . -83, as being open and above-board, in terms of living like regular Americans? Or would you describe his life style as that of someone who is concealing their identity?

A: Oh, no. No, I mean, Marc and I have no secrets. He's not concealing his identity at all; he has – he's never been, as long as he's lived with me.

Q: In terms of the rest of the world.

A: Right, exactly. Never.

Q: And when did you lean that Marc Doggett was a fugitive?

A: September 5th, 1988, when they – when [202] the marshals arrested him.

Q: It is your testimony that at no time during the six-year period that you've known Marc Doggett that he has ever said one word to you about having any knowledge that he was wanted by any law enforcement agency?

A: That is correct.

Q: You heard your mother-in-law testify that she had had a conversation with you after that . . .

A: Uh-huh.

Q: . . . about this earlier inquiry, eight years prior, by law enforcement?

A: Right, she did.

Q: When she told you that, did she indicate to you that this was – kind of had been her secret?

A: She told me that she never told anybody. She was the only one that knew and she just never – she didn't tell Marc because she thought he would never come back into the country, at first.

Then, when she finally – when she talked to him when he was in Panama, he was in such a bad way she didn't want to make him any more depressed than what he was. So she didn't tell him then. And she told me that she told priests or nuns, and that was it. But nobody in the family ever knew.

Q: Have you all attended church there in Reston?

[203] A: Yes.

Q: Where do you go?

A: St. John Newman.

Q: And how is Marc known at the church?

A: We were married there.

Q: By what name?

A: Oh, by Marc Doggett. By Marc Doggett.

Q: And does he attend frequently?

A: Yeah, we go every Sunday.

Q: And, to your knowledge, is Marc a registered voter in Virginia?

A: Yes, he is.

Q: Have you gone to the voting booth with him?

A: Right. We voted in '84, and just in '88.

Q: And what does his voter registration card reflect his name to be?

A: Marc Gilbert Doggett.

Q: And, to your knowledge, has Marc Doggett had a driver's license in the State of Virginia?

A: He got it in November of 1983.

Q: And has had it since?

A: Yes.

Q: So far as you know.

A: Yes.

Q: You've seen it?

[204] A: Oh, yes.

Q: You live with him.

A: Yes.

Q: You see it on the dresser every morning.

A: I've seen it in his wallet, yeah.

Q: And he has also told you he has gotten some tickets; hadn't he?

A: Oh, yeah. Uh-huh.

Q: Do you recall how many tickets he's told you he's gotten?

A: I think he has gotten three tickets.

Q: And what name did he get those tickets in, if you know?

A: Marc Gilbert Doggett.

Q: And, to your knowledge, has he had any other confrontations with the law other than these three traffic tickets?

A: No, never.

Q: Do you all – or, does Marc have credit cards in his name?

A: Yes.

Q: A bunch of them?

A: A lot, yeah.

Q: Amoco?

A: Yes.

[205] Q: Choice Visa?

A: Yes.

Q: Mobile?

A: Yes.

Q: Chevron?

A: Yes.

Q: Giant Food?

A: Yes.

Q: Radio Shack?

A: Yes.

Q: Insiders Hot-Line?

A: Yes.

Q: Express Bank Card?

A: Yes.

Q: Would it be accurate for me to assume that you all utilize credit cards as a method by which you purchase items?

A: Right, correct.

Q: And both of your homes were financed with a bank?

A: Right.

Q: Now, during this period of time, have you all filed income tax returns?

A: Yes.

Q: And have you filed them jointly?

A: Yes.

[206] Q: Let me hand you what I would ask to be marked as Doggett Exhibit G, which I would ask . . .

MR. SHEPPARD: Judge, this is a composite exhibit, if you will. And let me, Mrs. Doggett, ask you to tell the Court . . .

THE COURT: Let them get introduced first.

MR. SHEPPARD: Yeah, I'm sorry.

MR. MORRIS: I have no objection.

THE COURT: G will be admitted.

(Defendants' Exhibit G received in evidence.)

BY MR. SHEPPARD:

Q: Is this your 1983 tax return (tendering)?

A: Yes, it is.

Q: And is that your signature?

A: Yes.

Q: Is that Marc Doggett's signature?

A: Yes.

Q: And the next document, coming from the bottom, is that your 1984 tax return?

A: Yes.

Q: And are those both of your signatures?

A: Yes.

Q: And the next document from the bottom, is it not your 1985 tax return?

A: (Witness pausing.)

[207] Q: Is it?

A: Yes, it is.

Q: And are those your signatures (perusing document)?

A: Here (indicating).

Q: That's '86. I don't see your signatures on your '85 return. Would you review that and tell me if it appears to be your 1985 tax return?

A: (Witness complying.) Yes, it is. But I don't see signatures.

Q: And the next document from the bottom, does that appear to be your 1986 tax return?

A: Yes.

Q: And are those your signatures?

A: Yes.

Q: Both you and Marc?

A: Yes.

Q: And the last document, the top document, is this your 1987 tax return and are those your signatures?

A: Yes.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs.

MARC GILBERT DOGGETT
11031 Thrush Road
Reston, VA 22091

SSN 242-96-6211

(Name and Address of Defendant)

JUDGMENT IN A CRIMINAL CASE

Case Number
80-11-Cr-J-16

Filed March 31, 1989

William J. Sheppard
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[x] guilty [ ] nolo contendere] as to count(s) ONE (1) of the Indictment, and [ ] not guilty as to count(s) _____

THERE WAS A:

[[x] finding [ ] verdict] of guilty as to counts 1 of the Indictment

THERE WAS A:

[[ ] finding [ ] verdict] of not guilty as to count(s) ___ .

[ ] judgment of acquittal as to count(s) _____.

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: conspiracy to import into the United States a quantity of cocaine, a Schedule II controlled substance; in

violation of T. 21, U.S.C., Section 963, as charged in count I of the Indictment.

(OFFENSE DATES: on or about August 1979 through January 1, 1980)

IT IS THE JUDGMENT OF THIS COURT THAT: the imposition of sentence is hereby suspended and the defendant is placed on probation for a period of THREE (3) YEARS, upon the standing conditions of probation of this Court.

IT IS FURTHER ADJUDGED that defendant pay a fine to the United States in the sum of $1,000.00, to be paid immediately.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

No. 80-11-Cr-J-16 USA v. MARC GILBERT DOGGETT

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work notify your probation officer at once, and consult him prior to job changes;

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and reports as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $ N/A pursuant to Title 18, U.S.C. Section 3013 for count(s) as follows:

IT IS FURTHER ORDERED THAT count TWO (2) of the Indictment is DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

March 31, 1989
Date of Imposition of Sentence

/s/ _____
Signature of Judicial Officer
JOHN H. MOORE II, UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

March 31, 1989
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____,
Date

the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

_____

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

February 25, 1991

Mr. Wm. J. Sheppard
Sheppard and White
215 Washington St.
Jacksonville, Fl 32202

Re: Marc Gilbert Doggett
v. United States
No. 90-857

Dear Mr. Sheppard:

The Court today entered the following order in the above entitled case:

the petition for a writ of certiorari is granted.

Very truly yours,
William K. Suter, Clerk

Supreme Court, U.S.
FILED
APR 26 1991
OFFICE OF THE CLERK

No. 90-857

In The

Supreme Court of the United States

October Term, 1990

MARC GILBERT DOGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

WM. J. SHEPPARD
(Counsel of Record)
ELIZABETH L. WHITE
SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, FL 32202
(904) 356-9661

Attorneys for Petitioner

April 26, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

(1) Where taken together, three of the four factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), weigh in favor of the accused, should an additional mandatory requirement of actual prejudice be imposed in order for the accused to prevail on a claim that his right to a speedy trial has been violated; and

(2) Has *Moore v. Arizona*, 414 U.S. 25 (1975), which holds that an affirmative demonstration of prejudice is not required, been reversed?

LIST OF PARTIES

The petitioner is Marc Gilbert Doggett. The respondent is the United States of America.

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II.

WHERE, AS IN THIS CASE, THE TIME EQUAL TO THE STATUTE OF LIMITATIONS HAS RUN FROM INDICTMENT TO ARREST AND THE DEFENDANT DOES NOT KNOWINGLY AVOID ARREST FOR THE OFFENSE, OR OTHERWISE WAIVE HIS RIGHT TO A SPEEDY TRIAL, THE DEFENDANT SHOULD NOT BE REQUIRED TO ESTABLISH ACTUAL PREJUDICE TO PREVAIL ON A SPEEDY TRIAL CLAIM 22

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No. 90-857

In The

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October Term, 1990

MARC GILBERT DOGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals [Pet.App. 64-105] is reported at 906 F.2d 573. The opinion of the district court [Pet.App. 62-63] is not reported.

JURISDICTION

The judgment of the court of appeals [Pet.App. 64-105] was entered on July 19, 1990. A petition for

rehearing with a suggestion for rehearing *en banc* was denied on September 12, 1990 [Pet.App. 106-108]. A petition for writ of certiorari was filed on November 30, 1990 and was granted on February 25, 1991 [J.A. 118]. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . "

STATEMENT OF THE CASE

This case arises from Marc Gilbert Doggett's conviction for one count of conspiracy to import cocaine, entered after a conditional plea of guilty pursuant to Fed.R.Crim.P. 11(a)(2). [J.A. 114, Pet.App. 65]. On February 22, 1980, Mr. Doggett was indicted in the United States District Court for the Middle District of Florida, Jacksonville Division, on charges of conspiracy to import cocaine, in violation of 21 U.S.C. § 963, and conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846. [J.A. 1, 4-11, 16-17, Pet.App. 65-66]. Without knowledge of the indictment and, therefore, through no fault or evasion on the part of Mr. Doggett, he was not arrested for this offense until September 5, 1988 – over eight and one-half years after his indictment. [J.A. 73, 107-108, Pet.App. 66].

During this "presumptively prejudicial" time period [Pet.App. 77], the Government had ample opportunity to notify Doggett of the indictment against him, but failed to do so. [J.A. 24-32, 62-69]. By these proceedings, Mr. Doggett contends that the Government's delay in prosecuting him violated his constitutional right to a speedy trial.

At the time of his arrest, Mr. Doggett, was thirty-two years old, married, and gainfully employed. [J.A. 99-113; Pet.App. 50,73-74]. At the time of his indictment, he was twenty-three years old. [Pet.App. 50]. Since 1982, he has lived continuously, openly and honestly in the Reston, Virginia area under his true name while working, voting, going to school, and paying taxes. [J.A. 99-113; Pet.App. 14-15]. Mr. Doggett met his wife, Delores Doggett, in the fall of 1982, and married her in October, 1983, in Reston, Virginia, where they have resided since. [J.A. 99-101-108; Pet.App. 73]. Together, he and his wife have bought and financed two homes in their own names. [J.A. 101-111; Pet.App. 73].

Since his indictment, Mr. Doggett has never concealed his identity from the Government. [Pet.App. 73]. Since his marriage in 1982, Mr. Doggett has never been in any legal trouble, with the exception of three traffic tickets. [J.A. 109-110; Pet.App. 73]. Mr. Doggett is and has been a registered voter, has had a Virginia driver's license, has had several credit cards in his name, and has filed federal income tax returns. [J.A. 108-111; Pet.App. 73-74]. In short, there is no dispute that he has ever sought to conceal his identity to avoid detection, and

indeed no finding that Mr. Doggett ever knew that there was an indictment issued against him. [Pet.App. 66].[1]

Unbeknownst to Mr. Doggett until almost a decade later, he had on February 22, 1980, been indicted for his peripheral involvement in a cocaine importation scheme. [Pet.App. 66]. A warrant for Mr. Doggett's arrest was also issued on the day he was indicted but he was not arrested however, until September 5, 1988, some eight and a half years later. [Pet.App. 65-73]. The indictment itself was unsealed and made known to at least one of the petitioner's co-defendants on the day it was handed down. Indeed, some of Doggett's co-defendants were tried in September, 1980. [J.A. 13, 29-30].

Immediately after the court issued the arrest warrant directing the United States Marshal's Office to arrest Doggett, Agent Douglas Driver of the Drug Enforcement Agency (hereinafter DEA), the case agent for the Government, interceded and sent a memorandum to the United States Marshal's Office indicating that the DEA would "handle" the arrest. [J.A. 44, 50; Pet.App. 65-66]. The memorandum had the intended effect of relieving the Marshal's office and other governmental agencies from any responsibility for arresting the defendant. [J.A. 50]. Twenty-six days after the indictment and issuance of the arrest warrant, Agent Charles Overton of the North Carolina State Bureau of Investigation and Officer Larry

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[1] With respect to this issue the Eleventh Circuit specifically found, "It is uncontested that Doggett did not know at this or any time prior to his arrest in 1988 that he had been indicted or that a warrant for his arrest had issued." [Pet.App. 66].

Rawlins of the Wake County Beverage Control Office, while acting as part of a DEA Task Force, were instructed to go to the home of petitioner's parents in Raleigh, North Carolina to locate and arrest petitioner. [J.A. 18]. This first effort to apprehend Mr. Doggett failed.

On March 18, 1980, Agent Overton talked to defendant's mother, Leonor Pinzon Doggett, concerning her son and told her about the arrest warrant. [J.A. 18, 80]. Mrs. Doggett informed the agent that her son had left home the previous Friday, March 14, 1980, and gone to Miami to renew his passport and from there was going to fly to Colombia with his cousin. [J.A. 18-19]. Mrs. Doggett was extremely cooperative with the agents, and told them her son's departure flight number from Miami. [J.A. 18-19]. She never told petitioner of the agents' visit, nor did she tell anyone in their family. [J.A. 107-08]. No further effort was ever undertaken by the Government to locate Mr. Doggett's whereabouts through his family. [Pet.App. 13; Tr. 174,189-92].

The Government issued a teletype on March 18, 1980, to all United States Customs stations, EPIC[2] and INTERPOL,[3] stating that Marc Gilbert Doggett was wanted for his arrest as a result of his indictment. [J.A. 19-20]. The entries into these United States computer networks were cancelled six weeks later on May 2, 1980. Agent Driver

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[2] EPIC is the acronym for the El Paso Intelligence Center which "[c]oordinates intelligence gathering operations for various federal law enforcement agencies. . . ." [Pet.App. 67, n.3].

[3] INTERPOL stands for the International Criminal Police Organization which serves as an international clearinghouse for law enforcement organizations. [J.A. 96-97].

testified that he did not request the cancellations but "guessed" that the system had a standard procedure to cancel the entries after a certain number of days. [J.A. 86]. Inexplicably, Mr. Doggett's name was not entered into the National Crime Information Center computer system, the primary law enforcement computer system, until April 2, 1981. [J.A. 23-24, 46-47, Pet.App. 68]. The Government's agent Driver testified that he did not enter the name until that date because he had erroneously assumed that his prior teletype put the petitioner's name into all Government law enforcement computer networks. [J.A. 24, Pet.App. 68].

No further action of any sort was taken until September, 1981, when the Government learned that Mr. Doggett had been arrested in Panama. [J.A. 24]. Upon learning of this arrest, DEA agent Driver, contacted the DEA agent in charge of the Panama office. [J.A. 24-25]. According to Driver, he was told that his counter-part in Panama had submitted an informal written request to the Panamanian Government to release Mr. Doggett to the United States. [J.A. 27]. No written confirmation of this informal request was produced in the record below. [J.A. 30-32]. No request for extradition under the formal extradition treaty existing between the countries was ever invoked or utilized. [J.A. 57; Pet.App. 69]. The State Department was in contact with Mr. Doggett while he was incarcerated in Panama and while the DEA was supposedly trying to arrest him. Although The Panamanian offices of the State Department and DEA were then only two blocks away from one another. [J.A. 62], no attempt was made to coordinate their effort with respect to Mr. Doggett.

Nothing was done to locate or apprehend Mr. Doggett for the next three years, and the only activity reflected in the Government's file was the submission of completely erroneous reports by the DEA to the effect that Mr. Doggett remained incarcerated in Panama. [J.A. 57-63, 73, 84, 89-90; Pet.App. 70-71]. In each report, the first of which was dated January 6, 1984, the second July 18, 1984, and the third March 10, 1985, the DEA erroneously reported that Mr. Doggett was still in jail in Panama. [J.A. 33]. These reports were based solely on the DEA's "assumption" that Mr. Doggett was still in a Panamanian jail. [J.A. 57-60]. No investigation was ever conducted by the DEA to determine if this "assumption" was correct. In fact, as of even the first erroneous report, Mr. Doggett was no longer in Panama [J.A. 65-66; Pet.App. 70-71], having returned to the United States, utilizing his correct name, and residing within a close geographic distance of his parental home. [Pet.App. 73; Tr. 214].

Mr. Doggett's parents were not notified by the United States of his Panamanian incarceration. [Pet.App. 13, Tr. 174, 189-192]. His mother did however make one visit to him, and sent him money to help him survive the extreme conditions of the Panamanian jail. [Pet.App. 13; Tr. 176-177, 179-180]. Further, he was regularly visited by personnel from the U.S. State Department in Panama. [J.A. 62-64]. He was thus known and in contact with the State Department and the United States was aware post-indictment of his whereabouts. According to DEA Agent Driver, there was no prohibition against the DEA and the State Department coordinating their efforts as to Mr.

Doggett, "[a]nd it should have been done. It should have been followed up on, but apparently it wasn't." [J.A. 66]. During his incarceration, the Government never notified Mr. Doggett that he had been indicted in the United States, nor was a copy of the indictment served on him by either the DEA or the State Department.

In August 1985, DEA learned for the first time that Mr. Doggett had in fact been released from Panamanian custody in July, 1982, and this was only learned due to the coincidental transfer to Panama of DEA agent Driver. [J.A. 31-32; Pet.App. 71].[4] At this point, the agent erroneously "assumed" that Mr. Doggett knew of the indictment, had left Panama for Colombia, and was still located there. [J.A. 66]. No effort was ever undertaken to locate and arrest Mr. Doggett during or after his 1981 Panamanian arrest, and the last and only thing done thereafter to effect Mr. Doggett's arrest " . . . would have been this fugitive declaration prepared March 19, 1981, that resulted in his going – being entered into NCIC." [J.A. 73].

By 1985, the DEA in Panama no longer even maintained a file on Mr. Doggett, apparently due to the agency's policy of destroying inactive files. [J.A. 31-32]. United States Customs was not notified to watch for him if he entered the country; the only documentation that the Customs agency ever had regarding Mr. Doggett was a

[4] Ironically, Agent Driver never wrote a report indicating Mr. Doggett had been arrested in Panama until April 26, 1983, over a year after Doggett's release from Panamanian custody. [J.A. 35].

secondary search request which had been cancelled in May, 1980. [J.A. 86]. The Government's sole effort to execute the arrest warrant on petitioner from September, 1981 onward consisted of periodic checks of the Jacksonville DEA file to see if the case was still active. [J.A. 73, 89-90].

After Mr. Doggett was released from Panamanian captivity, he went to Colombia, staying briefly with an elderly aunt. [Pet.App. 70; Tr. 181-82]. On September 28, 1982, just three months after his release from the Panamanian jail, he returned to the United States using his own passport to enter at JFK Airport in New York, completely unaware of the indictment. [Pet.App. 70]. He lived for the next few months in North Carolina at his grandmother's home. [J.A. 99-100]. During that period, he met his wife and settled into the open, stable, and productive life that he has led for the ensuing years. [J.A. 100-13].

For over six years after his return home, no effort whatsoever was undertaken to determine Mr. Doggett's whereabouts. Neither a credit bureau nor driver's license check was ever undertaken during this time. [J.A. 38-39; Pet.App. 72]. Nor did the Government utilize a number of routine investigative techniques to locate an individual. [Pet.App. 72]. During this entire time, Mr. Doggett used his legal name and made no effort to conceal his identity or whereabouts. [Pet.App. 73].

But for the institution of a program called "WANT II," (Warrant Apprehension Narcotics Teams) [J.A. 91], it is clear the Government would have never arrested Mr.

Doggett. WANT II was a program began in September, 1988, by which the Marshal's Service determined whether warrants were outstanding and checked with the responsible law enforcement agency to determine if a given warrant had been or needed to be served. [J.A. 91,93]. Shortly after WANT II began in September, 1988, [J.A. 93], a search for Mr. Doggett was commenced, and within thirty minutes, the Government located and identified him through a credit bureau check. [J.A. 94-95]. According to Deputy Marshal Carr, who was in charge of the WANT II program, *"So as a routine,* when we started up the operation, we wanted to see what was available to us, *so we'd run the name automatically through* and get a credit check on them and see if there was any kind of activity on their credit." [J.A. 92] (emphasis added). The Government then quickly learned Mr. Doggett's driver's license number, the make and tag number of his vehicle, his wife's name, his employer, and his address. [J.A. 94-95].

Eight and one-half years after his indictment, Mr. Doggett was arrested on September 5, 1988. [J.A. 1,98; Pet.App. 1,65]. Mr. Doggett was arraigned on September 29, 1988, and the magistrate held a hearing on petitioner's Motion to Dismiss for violating his right to a speedy trial under the sixth amendment on December 14, 1988. [J.A. 12]. At that hearing, it was discovered that in the years between indictment and arrest, two events had happened that seriously interfered with any trial of this case. First, all of the seventeen tape-recorded conversations relevant to Mr. Doggett's prosecution had been lost. [J.A. 79]. Secondly, Ivan Cifuentes, a Government informant and a material witness to the events at issue, had

disappeared. [J.A. 78-79]. Although the case agent believed he would be able to locate the informant Mr. Cifuentes, he was, at the time of the hearing, "missing in action." [J.A. 78-79].

After the hearing on December 27, 1988, the magistrate entered a Report and Recommendation recommending that the motion to dismiss be denied. [Pet.App. 1, 59-60]. The petitioner filed timely Objections to the Magistrate's Report and Recommendation. [Pet.App. 62]. On January 31, 1989, the district court entered its order denying the petitioner's motion to dismiss for speedy trial violation, merely accepting the Magistrate's Report and Recommendation. [Pet.App. 62-63]. On February 3, 1989, the petitioner entered into a plea agreement reserving the right to appeal the dispositive issue of the speedy trial violation. [J.A. 114-17, Pet.App. 65]. At sentencing on March 31, 1989, the petitioner was adjudicated guilty of a felony and sentenced to three years of probation and a $1,000 fine. [J.A. 114-17].

On appeal, the Eleventh Circuit acknowledged that the Government had made no effort whatsoever to locate Mr. Doggett since 1985. [Pet.App. 71-72]. It further found:

> It is undisputed that from the time Doggett returned to the United States to the present, he has led a normal, productive, and law-abiding life. He met his wife in October 1982 and married a year later. Doggett interacted openly and freely in the community using his real name and making no attempt to conceal his identity or whereabouts. He financed two houses through the bank, possessed credit cards, was a registered voter, filed income tax returns, obtained a driver's license, was issued three traffic tickets,

> obtained his associate degree at college, and was employed as a computer operations manager.

[Pet.App. 73-74].

It then examined the four factors relevant to a speedy trial analysis: 1) length of the delay; 2) reason for the delay; 3) defendant's assertion of the right; and 4) prejudice to the defendant. It concluded that the Government's eight and one-half year delay between Mr. Doggett's indictment and arrest was "presumptively prejudicial" [Pet.App. 77] and that two of the other factors weighed " . . . against the government and none of the factors favor[ed] the government . . . " [Pet.App. 92].

Examining the fourth factor of prejudice, however, the court found that since the first three factors of the analysis did not "weigh heavily" against the Government, Mr. Doggett was required to establish "actual prejudice." [Pet.App. 90-91]. The Eleventh Circuit also employed a "clearly erroneous" test in examining the prejudice question, concluding that the lower court's finding of an insufficient showing of prejudice was not clearly erroneous and would be affirmed. [Pet.App. 97-98]. As a result, rather than independently examining and balancing the four factors as a whole, the court gave the prejudice factor controlling weight and, as to it, did not independently examine the degree of prejudice that had in fact been established.

In his dissent Judge Clark found that the Government's conduct in this case was "grossly negligent." [Pet.App. 102]. He criticized the majority's "mechanistic

approach" to what the majority opinion itself had conceded was " . . . a difficult and sensitive balancing process." [Pet.App. 100], *citing Barker v. Wingo*, 407 U.S. 574, 533 (1972). Examining the four relevant factors, Judge Clark concluded that the length of delay and reason for the delay should weigh *heavily* against the Government. [Pet.App. 101-02]. With respect to the reason for the delay, he concluded:

> As the majority concedes, the government's only justification for this inordinate delay is that it was not guilty of "bad faith or a dilatory purpose." At 578. According to the majority, the government was merely "negligent." The majority correctly recounts the government's 'attempts' to capture Doggett. It is evident on its face that the government did not capture Doggett because he was not worth the effort. He was a small fish in the ocean of those involved in the drug trade. Given that the government missed many opportunities to apprehend Doggett, I would consider its conduct in this case grossly negligent and would weigh this factor heavily against the government.

[Pet.App. 101-02] (footnote omitted).

As to the prejudice question, Judge Clark noted that the majority opinion failed to look at all the factors relevant to a speedy trial inquiry:

> There are other circumstances in this case which should be taken into account in determining Doggett's entitlement to relief. Because Doggett did not know he was indicted until he was arrested in 1988, he could not assert his right to a speedy trial earlier. In this case, Doggett has been leading "a normal, productive, and law-abiding life" since his return to the United States. At 577. It is reasonable to expect that

> after a certain point in time one will not have to answer for actions taken in the past. Generally, this protection is provided by the five-year statute of limitations in which "Congress has codified the policy that a person need not remain indefinitely in jeopardy for allegedly illegal acts." *See Mitchell*, 769 F.2d at 1547 (applying 18 U.S.C. § 3282). While the fact that the defendant does not learn about the charges until after the limitations period has expired does not automatically amount to a speedy trial violation, it is "another factor" that should be taken into account. *Id.* at 1547, 1548.

[Pet.App. 104-05]. Thus, balancing all factors relevant to the speedy trial inquiry "fairly and equitably," Judge Clark found the petitioner was entitled to the relief sought.

SUMMARY OF THE ARGUMENT

In determining whether a defendant should prevail on a speedy trial claim, this Court has looked to four interrelated factors: 1) length of delay; 2) reason for delay; 3) defendant's assertion of the right to a speedy trial; and 4) prejudice. This Court, however, has never required a defendant to make an affirmative showing of actual prejudice in order to prevail on such claim. *Moore v. Arizona*, 414 U.S. 25, 26 (1973); *Barker v. Wingo*, 407 U.S. 514, 533 (1972). In requiring the defendant to establish "actual prejudice," even where the remaining factors weigh in his favor, the court below did not engage in the balancing required by *Barker*. Instead, it gave the prejudice factor controlling weight over all other remaining

factors. Moreover, it examined only the prejudice to the defendant's ability to prepare a defense and did not consider other types of prejudice, recognized by this Court, which weighed in defendant's favor.

In addition, the court below did not properly allocate the burden of proof as to the prejudice question. Where, as here, the defendant did not waive his right to a speedy trial by knowingly avoiding arrest, the burden of proving no prejudice should rest with the Government, if a time period equal to the statute of limitations has run from the date of indictment to the date of arrest. Where the Government apprehends the accused within that period, the defendant would be required to establish actual prejudice. Where, however, there is the lack of diligence in apprehension, the Government should be required to prove the defendant was not prejudiced by the delay.

Had the correct analysis been applied to this case, the result would have been different. Balancing all four factors taken as a whole, it is clear that the balance weighs in favor of Mr. Doggett and that his Sixth Amendment right to a speedy trial was violated.

ARGUMENT

I.

WHEN THE FOUR FACTORS SET FORTH IN *BARKER v. WINGO*, ARE BALANCED AS A WHOLE, PETITIONER IS ENTITLED TO DISMISSAL OF THE CHARGES AGAINST HIM.

As the Eleventh Circuit found [Pet.App. 74], there can be no dispute in this case that the eight and one-half year delay between Mr. Doggett's indictment and arrest was solely caused by the Government's negligent approach to his apprehension. At virtually every step in the proceedings, the Government failed to comply with its diligent, good faith duty to bring an accused to trial within a reasonable amount of time. *Smith v. Hooey*, 393 U.S. 374, 383 (1969). It failed to employ ordinary and readily available sources of information to locate him. It failed to follow through on information known to it. It failed to utilize its own agencies which, at that time, were in regular contact with Mr. Doggett, to inform him of the charges against him and, on the occasion it had specific knowledge of his whereabouts, it ignored its duty to, at a minimum, place him on notice of the indictment. Even when it finally realized Mr. Doggett was no longer incarcerated in Panama, it took absolutely no steps to find him, although, as evidenced by his later arrest, such attempts would have located him within an hour. The result of these cumulative failures was to deprive Mr. Doggett of his constitutional right to a speedy trial.

In the seminal case of *Barker v. Wingo*, 407 U.S. 514 (1972), this Court set forth the framework by which to analyze whether an accused's constitutional right to a speedy trial has been violated. In *Barker*, the defendant

was indicted for murder in 1958. Due to a series of continuances requested by the State, which were not objected to by the defendant, he was not tried and convicted until over four years later. *Id.* at 516-517. On appeal, and later through habeas corpus proceedings, the defendant contended that he was denied his right to a speedy trial.

On review, this Court examined the speedy trial question and adopted a balancing test " . . . in which the conduct of both the prosecution and the defendant are weighed." *Id.* at 530 (footnote omitted). Finding that such a balancing test "necessarily compels courts to approach speedy trial claims on an ad hoc basis," this Court nonetheless set forth "some" of the factors to be utilized in determining whether a speedy trial violation has occurred: 1) length of delay; 2) reason for delay; 3) defendant's assertion of the right; and 4) prejudice. *Id.* at 530.

Significantly, however, the Court found no one factor to be " . . . either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Id.* at 533. Instead, the Court opined that these factors are related " . . . and must be considered together *with such other circumstances as may be relevant.*" *Id.* (emphasis added). This Court further cautioned:

> In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Id. (footnote omitted).

The first factor – length of delay – was held to be a "triggering" mechanism. If the delay is of sufficient length, as it plainly is here, an inquiry into the other factors is warranted. *Id.* With respect to the reasons for the delay, although governmental negligence is to be "weighted less heavily" it should nonetheless be considered against the Government. *Id.* at 530. Where, as here, the delay is the result of gross negligence by the Government, this factor should be weighed more heavily than mere negligence or bureaucratic backlog.

With respect to assertion of the right, this Court found that the defendant in *Barker* had been given the opportunity to object to the numerous continuances in his case, but had failed to do so. Indeed, the Court stated, "[m]ore important than the absence of serious prejudice is the fact that Barker did not want a speedy trial." *Id.* at 534. In concurring with the majority, Justice White emphasized this point when he stated, "[I]t is apparent that had Barker not *so clearly* acquiesced in the major delays involved in this case, the result would have been otherwise." *Id.* at 537 (emphasis added). Thus, this Court has clearly distinguished between instances, where the defendant *knowingly* acquiesces to the Government's delay, from those instances where no such waiver is apparent from the record. In the present case, there is absolutely no evidence that Mr. Doggett in any way waived his right to a speedy trial or knowingly acquiesced in the Government's delay.

The Court found that the final factor of prejudice should be analyzed, " . . . in light of the interests of defendants which the speedy trial was designed to protect." *Id.* at 532. Three such interests are: 1) prevention of

oppressive pretrial incarceration; 2) minimization of "anxiety and concern" of the accused; and 3) limitation of the possibility that the defense will be impaired. *Id.*

With respect to the second factor of the prejudice analysis, this Court has acknowledged the destructive effect lengthy pre-trial delays can have on an individual. *Barker*, 407 U.S. at 520-521. Indeed, in his dissent below, Judge Clark noted the total disruption to Mr. Doggett's "normal, productive and law-abiding life" caused by his belated arrest. *Id.* at 583. In this case, a young adult, not knowing he was in trouble with the law, rehabilitated himself without help from society and became a productive citizen, only to find himself arrested years later on a cocaine charge. This arrest was a total and complete disruption of Mr. Doggett's life and resulted in mental anguish no less traumatizing and, perhaps, more traumatizing than had he been arrested in 1980. Thus, if prejudice is to be evaluated not only in terms of trial prejudice, but also in terms of prejudice to one's life, sufficient prejudice has been established in this case.

In *Moore v. Arizona*, 414 U.S. 25 (1973), this Court again addressed the prejudice prong of the speedy trial analysis. In that case, the defendant was not tried for murder until three years after he was charged and twenty-eight months after he first demanded a speedy trial. Prior to trial, he filed a state habeas application, which was denied, the Arizona Supreme Court, specifically finding that the defendant had failed to establish prejudice.

On review, this Court in a *per curiam* opinion reversed and held that a showing of prejudice is not essential to establish a speedy trial violation. In doing so, the court re-affirmed the use of "a difficult and sensitive" balancing test, considering all four factors taken as a whole. *Id.* at 26. It then observed:

> The state court was in fundamental error in its reading of *Barker v. Wingo* and in the standard applied in judging petitioner's speedy trial claim. *Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial . . .

Id.

While confirming that no one factor is necessary or sufficient to prevail on a speedy trial claim, this Court also noted, "[P]rejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings." *Id.* at 26-27 (footnote omitted). *Moore* thus clearly suggests that a wide variety of effects upon an accused's life may be considered within the prejudice analysis.

Previously, in *United States v. Marion*, 404 U.S. 307 (1971), this Court had examined the prejudice question within the context of pre-indictment delay. The Court declined to dismiss an indictment where the defendants were indicted within the applicable statute of limitations and arrested shortly thereafter. Concluding that speedy trial guarantees do not become applicable until an individual has, in some fashion, been accused, this Court found the statute of limitations sufficient to prevent stale prosecutions. Within that framework, the Court discussed

the many ways in which an individual may be prejudiced by delay:

> Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. . . . Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

Id. at 320. *See also Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967).

It is precisely this type of prejudice, referred to by Judge Clark in his dissenting opinion below, that is present in this case. As noted by Judge Clark, "The defendant cannot always show all of the prejudice he faces when the government waits over eight years to bring him to trial." [Pet.App. 103]. Moreover, Mr. Doggett demonstrated the loss of seventeen tape recordings, which could well have established a valid defense, and further established that a material witness had disappeared. [J.A. 79]. Thus, Mr. Doggett's delayed arrest completely disrupted his life, drained his financial resources, interfered with his liberty and may well have actually interfered with his ability to present a defense.

In its analysis, the Eleventh Circuit not only overlooked this perhaps more intangible prejudice, and down

played the possibility of prejudice at trial, it also skewed the balancing test, giving the prejudice factor, as it interpreted it, more weight than the other three factors combined. [Pet.App. 98]. Although this approach was consistent with the Eleventh Circuit's earlier opinion of *United States v. Mitchell*, 769 F.2d 1544 (11th Cir. 1985);[5] it was entirely inconsistent with the opinions of this Court.

While no one factor should be given greater weight than the other three combined, under the facts of this case Mr. Doggett established sufficient prejudice to make this factor favorable to him and, if not, at least neutral in the balancing analysis. The Eleventh Circuit did not properly balance the factors at issue. Had it done so, it would have reversed Mr. Doggett's conviction due to the Government's failure to give him a speedy trial.

II.

WHERE, AS IN THIS CASE, THE TIME EQUAL TO THE STATUTE OF LIMITATIONS HAS RUN FROM INDICTMENT TO ARREST AND THE DEFENDANT DOES NOT KNOWINGLY AVOID ARREST FOR THE OFFENSE, OR OTHERWISE WAIVE HIS RIGHT TO A SPEEDY TRIAL, THE DEFENDANT SHOULD NOT BE REQUIRED TO ESTABLISH ACTUAL PREJUDICE TO PREVAIL ON A SPEEDY TRIAL CLAIM.

In many of its cases addressing speedy trial claims, one of the factors this Court has examined is whether the

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[5] *See also Ringstaff v. Howard*, 885 F.2d 1542, 1545 (11th Cir. 1989) (en banc) ("[T]he three *Barker* factors must weigh *heavily* against the Government before prejudice should be presumed.") (emphasis in original).

defendant has, by his own conduct, knowingly waived his right to a speedy trial. *See e.g., Barker v. Wingo*, 407 U.S. at 528-530. A defendant can waive such right in two ways. First, he can acquiesce to repeated continuances of his trial. *Id.* at 534. Second, he can knowingly avoid arrest on the charges against him. *See e.g., Rayborn v. Scully*, 858 F.2d 84, 92 (2d Cir. 1988). In both such instances, the accused has knowingly given up a right available to him. *Barker*, at 529 ("We hardly need add that if the delay is attributable to the defendant, then his waiver may be given effect under the standard waiver doctrine . . . "); *Scully*, at 92 ("In this case, Rayborn's status as a bail jumper, absconder and fugitive weighs heavily against him in our analysis of his speedy trial claim.").[6]

Where the accused is unaware of the indictment pending against him, however, it cannot be said that he has knowingly waived his right to a speedy trial. Thus, a critical factor in the speedy trial analysis should be whether the accused knowingly attempted to avoid arrest or in some fashion agreed to the Government's delay. The rationale for this waiver rule is straightforward. Where the defendant is ignorant of the charges against him, he does not have the ability to assert his speedy trial right. Green, *"Hare and Hounds": The Fugitive Defendant's Constitutional Right to Be Pursued*, 56 Brooklyn L.Rev. 439, 460 (Spring, 1990). Where, as here, however, the Government easily could have notified the accused of such right, it should not be heard to complain that he failed to assert it.

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[6] In *Scully, supra*, 858 F.2d at 92, the court also noted that the defendant failed to seek a speedy trial until " . . . well over three years after he was informed of the subject charge."

If there has been no such waiver, this Court should adopt a "bright-line" approach to the prejudice question. Where the defendant lacks knowledge of the indictment and the statute of limitations[7] has expired from the date of indictment to the date of arrest, actual prejudice should be presumed. The Government should then be permitted to prove that the defendant has not been prejudiced by its delay. This time frame, which would have given the Government five years *from the indictment* in this case, is very generous to the Government, can be easily ascertained by all concerned, and follows a closely analogous time frame established by Congress.

This approach is also consistent with the approach employed by this Court in *United States v. Marion*, *supra*, 404 U.S. at 320-322. In *Marion*, the Court held that where the statute of limitations has not run for the offense charged, a period of three years between acts committed and indictment does not violate the sixth amendment. With respect to such limiting statutes, the Court stated, "These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *Id.* at 322 (footnote omitted).

Similarly, in *Toussie v. United States*, 397 U.S. 112, 114-115 (1970)[8] this Court noted that one of the purposes

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[7] Under the terms of 18 U.S.C. § 3282, the statute of limitations for the offenses charged against the defendant is five years.

[8] In *Toussie*, *supra*, this Court upheld the defendant's challenge to his conviction for failure to register for the draft where the Government waited eight years to prosecute him for that offense.

of the statute of limitations is " . . . to minimize the danger of official punishment because of acts in the far-distant past." This rationale is fully applicable where a defendant lacks knowledge of an indictment for an extended period of time, for it is after such extended time that the defendant is prejudiced in ways other than impairment of his defense at trial.

Where a defendant lacks knowledge of an indictment, the statute of limitations serves as a way to ensure that the Government meets its burden of bringing an individual to trial within a reasonable time. Once the period has expired from indictment to arrest without the individual being informed of a pending indictment, the burden should then rest with the Government to establish there was no prejudice to the defendant. If the Government meets this burden, it would remain free to continue its prosecution. If it cannot, dismissal of the charges against the defendant would be mandated.

This proposed standard for a defendant who is without knowledge of a pending indictment is consistent with the approach taken in *Smith v. Hooey*, 393 U.S. at 383, where this Court held that, upon demand, the Government has a "diligent, good faith" duty to bring an accused to trial. Application of such a standard would impose no undue burden upon the Government. Merely notifying the defendant that charges are pending against him would discharge the Government's initial duty. Establishing that a defendant knew of the charges against him and failed to assert his right to a speedy trial would also weigh heavily against him in the balancing process and, in most instances, would defeat his claim. *Barker*, 407 U.S. at 529. Only in those instances, where the defendant

did not have knowledge of a pending indictment, would a reviewing court be required to examine whether the statute of limitations had expired from indictment to arrest. Even then, a defendant's right to speedy trial discharge could be defeated where the Government can show that the remaining factors in the speedy trial analysis weigh in its favor.

The factor of prejudice would remain part of the Court's consideration. Where the accused could establish one of the three types of prejudice discussed in *Barker*, that factor would weigh in his favor. Under this test, however, prejudice would not be the controlling factor in determining whether the right to speedy trial has been violated. Rather, it would be one of the facts to be considered. This type of balancing process is precisely the type contemplated in *Barker* and provides a method of consistent application of that decision.

In the present case, the Government had both the ability and opportunity to notify Mr. Doggett of the indictment pending against him. The State Department was in-contact with both Mr. Doggett and his family, and was in communication with the DEA, during Mr. Doggett's incarceration in Panama. [J.A. 62-64]. It would have been a simple task for one of the two governmental agencies to notify Mr. Doggett of the indictment pending against him. Such notification would have discharged the Government's duty of due diligence. Since it made no effort to notify Mr. Doggett of the indictment pending against him for over eight years, he should not have been required to establish that his defense at trial was actually prejudiced by the government's delay.

Alternatively, this Court could adopt the analysis recently set forth by the New Mexico Supreme Court in *Zurla v. State*, 789 P.2d 588 (N.M. 1990). In that case, the court was called upon to determine whether a nineteen month delay between arrest and trial for the offense of shoplifting violated the defendant's right to a speedy trial. Concluding that it did, the court held that the extent to which the Government's delay is to be weighed is increased by the length of time during which no attempt is made to locate the accused. *Id.* at 591. The longer the Government fails to take reasonably diligent efforts to locate an accused, the more its inaction should be weighed against it. Under this standard:

> Once the defendant has demonstrated presumptively prejudicial delay and thus triggered the *Barker v. Wingo* analysis, the presumption of prejudice does not disappear. Rather, the burden of persuasion rests with the state to demonstrate that, on balance the defendant's speedy trial right was not violated.

Id. at 594.

Under either standard Mr. Doggett is entitled to relief. Over eight years lapsed between Mr. Doggett's indictment and arrest. During those years, the Government failed to exercise its duty of due diligence to locate Mr. Doggett and notify him of the indictment pending against him.

Since Mr. Doggett never knowingly waived his right to a speedy trial and since the factors set forth in *Barker v. Wingo*, 407 U.S. at 514, taken as a whole, weigh in his

favor, dismissal of the indictment against Mr. Doggett was required under *Barker*.

CONCLUSION

Mr. Doggett was denied his Sixth Amendment right to a speedy trial. Contrary to the dictates of this Court, the Eleventh Circuit concluded that the prejudice factor was dispositive over the other factors of the speedy trial analysis. It committed additional error when it held that Mr. Doggett had not established sufficient "actual prejudice," without examining other aspects of defendant's proof concerning prejudice. For these reasons, this Court should reverse the conviction imposed against Mr. Doggett in this cause.

Respectfully submitted,

Wm. J. Sheppard
(Counsel of Record)
Elizabeth L. White
Sheppard And White, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661

Attorneys For Petitioner

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No. 90-857

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARC GILBERT DOGGETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the delay between indictment and arrest violated petitioner's Sixth Amendment right to a speedy trial.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 64-105) is reported at 906 F.2d 573. The order of the district court (Pet. App. 62-63) adopting the report and recommendation of the magistrate (Pet. App. 1-61) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1990. A petition for rehearing was denied on September 12, 1990. Pet. App. 106-108. The petition for a writ of certiorari was filed on November 30, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

STATEMENT

Following his conditional plea of guilty in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to import cocaine, in violation of 21 U.S.C. 963. The district court sentenced petitioner to three years of probation and ordered him to pay a $1000 fine, but did not impose a prison term. J.A. 114-115. The court of appeals affirmed. Pet. App. 64-105.

1. In late 1979, petitioner was involved in a scheme to import cocaine from Colombia. Undercover DEA Agent Douglas Driver, who was investigating the scheme, agreed to purchase 40 kilograms of cocaine in Colombia from petitioner's supplier, Fabio Moreno. Moreno sent Agent Driver to petitioner in Raleigh, North Carolina, to obtain a sample of the cocaine. On November 24, 1979, petitioner gave Driver 5.7 grams of cocaine and $6,800 in cash and told him to give the cash to Moreno in Colombia. As a result of Agent Driver's investigations, Colombian police seized 40 kilograms of cocaine and arrested nine persons in Colombia. Tr. 20-21; Plea Tr. 20-22.[1]

On February 22, 1980, a federal grand jury indicted petitioner and seven others on charges stem-

[1] "Tr." refers to the transcript of the December 14, 1988, hearing on petitioner's motion to dismiss the indictment. "Plea Tr." refers to the transcript of petitioner's guilty plea proceeding on February 6, 1989.

ming from the aborted importation scheme. On March 18, 1980, two North Carolina police officers went to the home of petitioner's parents in Raleigh to arrest petitioner.[2] Petitioner's mother told the officers that petitioner had left four days earlier for Colombia to get cocaine. She told them the number of the flight he was on and agreed to notify them if he came home.[3] That same day, Agent Driver entered petitioner's name in the Treasury Enforcement Communication System (TECS)[4] and alerted all United States Customs Stations and Interpol. The following year, before petitioner returned to this country, Agent Driver had petitioner's name entered in the National Crime Information Center (NCIC)

[2] The government did not attempt to arrest any of the defendants between February 22 and March 18, 1980, because it was trying to lure some of the foreign defendants into the United States in order to accomplish a simultaneous arrest of as many of the defendants as possible. J.A. 14-18.

[3] At the hearing on petitioner's motion to dismiss the indictment, Mrs. Doggett explained that she had contacted the police about her son's drug problems on earlier occasions, and that she encouraged the officers in their attempts to arrest him on that occasion. Tr. 172-174.

[4] TECS is the computer system used by customs agents to screen individuals entering the United States at airports and border crossings. See Pet. App. 67 n.2. Unbeknownst to Agent Driver, the notation in TECS was apparently cancelled later in 1980, before petitioner returned to the country. Agent Driver explained at the hearing that he had asked the Customs officials to arrest petitioner the next time he entered the country, and that his experience had been that Customs officials routinely honored DEA requests. Pet. App. 5, 68; J.A. 86-87; Tr. 167-170.

computer system.[5] Pet. App. 3-7, 66-68; J.A. 18-19, 23-24, 46, 55, 80-81; Tr. 190-191.

In October 1981, Agent Driver learned that Panamanian authorities had arrested petitioner for importing cocaine into that country. Agent Driver consulted a DEA representative in Panama to learn the best way to obtain custody of petitioner. The DEA representative advised Agent Driver to seek to have petitioner expelled to the United States at the conclusion of the proceedings in Panama. The DEA representative told Agent Driver that the expulsion procedure had worked in the past and that the United States ordinarily did not attempt to extradite fugitives from Panama. In accordance with that advice, the DEA formally requested that the United States be given custody of petitioner at the conclusion of the Panamanian proceedings. In response, on October 15, 1981, the DEA office in Panama received a letter from the Attorney General of Panama granting the request and agreeing to expel petitioner to the United States after the Panamanian proceedings were completed.[6] Pet. App. 7-8, 11-12, 68-70; J.A. 24-29, 68-72; Tr. 47-50.

In July 1982, petitioner was released from the jail where he was serving his Panamanian sentence.[7]

[5] NCIC is a national computer network that alerts law enforcement officers if a person they have arrested is wanted in another jurisdiction. Pet. App. 6 n.3, 68 n.4; J.A. 36-37.

[6] Petitioner complains (Br. 6) that no written evidence of the request was introduced at the hearing. The district court, however, expressly found that the request was made and that the Panamanian officials granted it. Pet. App. 7-8.

[7] The circumstances surrounding petitioner's release are unclear. Agent Driver testified that when he arrived in Panama in 1985, "the Panamanian authorities * * * didn't know [petitioner] was out," J.A. 60; see Tr. 117, although there appears to have been a court order authorizing his release, see Pet. App. 10-11; J.A. 88; Tr. 259.

Contrary to the earlier representation of the Attorney General of Panama, petitioner was not expelled to the United States, but instead was allowed to proceed to Colombia, where he stayed with his aunt for several months. The United States embassy in Panama apparently learned of petitioner's release and advised the Department of State, but the fact of petitioner's release was not conveyed to anyone in the DEA. On September 25, 1982, petitioner reentered the United States at Kennedy Airport in New York. Although he initially lived with his grandmother in Brown Summit, North Carolina, he did not visit his parents' home in nearby Raleigh, or even advise his parents that he had reentered the country, until after his marriage in the fall of 1983. Pet. App. 10-11, 13-14, 70; J.A. 88-89, 99-100; Tr. 3-4, 177, 181-182, 209, 212-214.

After learning in October 1981 that the Attorney General of Panama had agreed to expel petitioner to the United States at the end of his Panamanian prison term, Agent Driver took no further action, assuming that petitioner was serving a lengthy sentence in a Panamanian prison. Pet. App. 8-9, 70-71; J.A. 58-64. Agent Driver heard nothing more about petitioner's status until 1985, when he was transferred to Panama. Upon arriving in Panama, Agent Driver learned that petitioner had been released but could not be located. Pet. App. 10; J.A. 31-32, 74-75; Tr. 43. Agent Driver made no further attempts at that time to locate petitioner, because he believed petitioner was still outside the United States. Pet. App. 71-72. In response to questioning at the hearing as to why he did not attempt to locate petitioner by

running driver's license and credit checks, Agent Driver explained that those procedures were rarely successful and that the computer technology available at the time made such checks quite cumbersome. Pet. App. 72; J.A. 38-42, 52.

In September 1988, the United States Marshals conducted a special program designed to locate fugitives from drug charges. Petitioner's name and address surfaced in the course of that program, and petitioner was arrested on September 5, 1988. Pet. App. 20-21, 72-73; J.A. 91-96; Tr. 149, 153, 160-162.

Petitioner's mother testified at the hearing on the motion to dismiss the indictment that she had never informed petitioner of the outstanding charges. She admitted, however, that another of her sons had heard about the 1980 trial of petitioner's co-defendants, William Barnes and Allen Riddle. She also admitted that she had visited petitioner in Panama and had maintained contact with him while he was in Colombia. Tr. 178, 181, 186-187, 192-193, 202. Petitioner did not testify at the hearing, and he introduced no direct evidence as to whether he knew about the outstanding indictment.

2. Following an evidentiary hearing, the magistrate recommended to the district court that it deny petitioner's motion to dismiss the indictment. Pet. App. 1-61.

At the outset, the magistrate applied the four-part test established in *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972), and found no constitutional speedy trial violation. The magistrate agreed that the eight-year delay between indictment and arrest was "presumptively prejudicial." The delay was long enough, the magistrate concluded, to warrant an inquiry into the three remaining factors. Pet. App. 27-28.

With respect to the cause of the delay, the magistrate found that the government had made a good-

faith effort to find petitioner following his arrest in Panama by initiating the expulsion process, and that the failure to arrest petitioner after his release in Panama was attributable to "nothing more than 'bureaucratic negligence.'" Pet. App. 35. Because the delay was "not intentionally done for tactical reasons," but was instead the result of negligence, the magistrate weighed the cause of the delay against the government less heavily than he would have if the delay had been deliberate. *Id.* at 40-41.

With respect to the next factor, whether petitioner had asserted his right to a speedy trial, the magistrate assumed petitioner was unaware of the pending charges and therefore had no occasion to request a prompt trial. The magistrate therefore did not weigh that factor against him. Pet. App. 43.

Finally, the magistrate found that petitioner suffered no prejudice as a result of the delay, in the form of anxiety, pretrial detention, or actual impairment of his defense. Pet. App. 46-51. After weighing all the factors, the magistrate determined that petitioner's right to a speedy trial had not been violated. *Id.* at 52.

3. The district court adopted the report and recommendation of the magistrate and denied the motion to dismiss the indictment. Pet. App. 62-63. Petitioner then entered a conditional guilty plea to the charge of conspiracy to import cocaine. At the plea hearing, petitioner admitted that on November 24, 1979, he gave Agent Driver and informant Ivan Cifuentes 5.7 grams of cocaine, and he gave Agent Driver $6800 in cash to be delivered to Fabio Moreno in Colombia. Plea Tr. 21-22.

4. The court of appeals affirmed. Pet. App. 64-105. Like the district court, the court of appeals con-

cluded that the delay between petitioner's indictment and his arrest was presumptively prejudicial and that the government had an obligation to make a diligent, good-faith effort to locate and apprehend petitioner. *Id.* at 78-79. But because the government was, at worst, negligent in its efforts to locate petitioner and did not act in bad faith or with a dilatory purpose, the court did not weigh that factor heavily against the government. *Id.* at 80-86. The court next found that petitioner's failure to assert his right to a speedy trial was a neutral factor, because it was not clear that he was aware of the outstanding charges. *Id.* at 86-90.

Because two of the first three factors weighed against the government (the length and cause of the delay), the court held that petitioner's "showing of prejudice need not be as strong as if the majority of the factors had weighed against [him]." Pet. App. 92. Even so, the court concluded that petitioner had not made a sufficient showing of prejudice to warrant dismissal. The court observed that petitioner "was never subject to pretrial incarceration and could not have suffered any 'anxiety and concern' relating to his indictment until he first learned of it in September, 1988." *Id.* at 94. The court likewise found that petitioner did not suffer any prejudice after he learned of the indictment, because he did not show that his defense was impaired. In particular, the court could not find that the loss of some government tape-recordings of conversations involving the charged transactions impaired petitioner's defense. The court explained that petitioner had presented nothing to suggest that the tapes contained any exculpatory evidence or that the government had destroyed them in bad faith; the court also noted that

the individuals whose voices appeared on the tapes were all available to testify. *Id.* at 96-97.

Judge Clark dissented. Pet. App. 98-105. In his view, the government was "grossly negligent" in failing to locate petitioner for eight years, and therefore both the first and second factors of the *Barker* test should be weighed heavily against the government. *Id.* at 101-102. Judge Clark concluded that the absence of prejudice was insufficient to overcome the force of those factors. *Id.* at 102-105.

SUMMARY OF ARGUMENT

In determining whether a defendant has been denied his Sixth Amendment right to a speedy trial, this Court looks to four factors: the length of the delay, the cause of the delay, whether the defendant requested a speedy trial, and whether the defendant suffered prejudice as a result of the delay.

A. The first factor, the length of the delay, is a triggering mechanism for speedy trial claims. The passage of eight years between indictment and trial is exceptional, and ordinarily would be difficult to justify. In this case, however, the eight-year period of delay must be deeply discounted. Although formal charges were instituted in 1980, petitioner was not arrested or otherwise under any form of restraint until his arrest in 1988. Petitioner's situation therefore "does not compare with that of a defendant who has been arrested and held to answer." *United States* v. *Marion*, 404 U.S. 307, 321 (1971).

B. The cause of the delay in this case was a valid one: the government did not know where petitioner was. The government lost track of petitioner because he was absent from the United States during the first two and one-half years following the return of

the indictment. During that period, the government took several steps to secure petitioner's presence for trial. Shortly after the return of the indictment, officers tried to arrest petitioner at his home, but they learned from petitioner's mother that he was en route to Colombia. Nonetheless, they obtained credible assurances of future cooperation from her. DEA Agent Driver entered petitioner's name in the available law enforcement computer systems in an effort to ensure that petitioner would be located upon reentry or arrest in the United States. Finally, when petitioner was arrested in Panama, Agent Driver secured a written agreement from the Attorney General of Panama to deliver petitioner to the United States upon his release. Having taken those steps, Agent Driver justifiably believed that he had done everything reasonably necessary to secure petitioner's presence. Uncontradicted testimony shows that the techniques that Agent Driver failed to use were difficult, expensive, and generally not productive. Under these circumstances, the delay cannot be considered to be the fault of the government.

C. It is undisputed that petitioner did not assert his right to a speedy trial. Petitioner's only explanation is that he was unaware of the indictment against him and therefore could not be expected to demand a prompt trial. At the hearing on the motion to dismiss the indictment, however, the government presented strong circumstantial evidence that petitioner was aware of the indictment, and petitioner did not introduce any direct evidence to the contrary. The defendant bears the burden of establishing a constitutional violation, and in light of petitioner's failure to testify at the hearing or introduce any other direct evidence supporting his contention, petitioner did not satisfy the burden of justifying his failure to request a speedy trial.

D. Finally, petitioner has failed to show that the delay prejudiced him. Because he was not arrested and claims not even to have known about the indictment, he does not and cannot claim any prejudice in the form of pretrial restraint or anxiety about the pending charges against him. Moreover, because in pleading guilty he admitted that he engaged in the charged conspiracy and distributed cocaine to Agent Driver, he cannot claim that the delay prejudiced him by denying him an opportunity to prove his innocence.

Petitioner's claim of prejudice, at bottom, is that the indictment should be dismissed because the delay in prosecuting him resulted in a disruption in his life years after the events to which the indictment related. Whatever the force of that point as a form of "prejudice" in the abstract, however, it has no real force in this case. Because petitioner received only a modest fine and a term of probation, the criminal proceeding against him has not resulted in the kind of disruption that would have resulted from a prison sentence, which he very likely would have received if he had been arrested and tried shortly after indictment. To be sure, if the indictment is not dismissed, petitioner will be branded as a convicted felon, but that would have happened if he had been tried and convicted in 1980. Petitioner is therefore in effect using his speedy trial motion not to remedy an injury he has suffered as a result of pretrial delay, but to put himself in a better position than he would have been in if he had been promptly tried.

ARGUMENT

THE GOVERNMENT'S FAILURE TO FIND PETITIONER FOR EIGHT YEARS AFTER INDICTMENT DID NOT DENY HIM HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL

As this Court recognized 86 years ago, "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905). The circumstances in this case, though unusual, did not deny petitioner his constitutional right to a speedy trial. There is no suggestion in this case that the government delayed petitioner's trial to gain a tactical advantage. Moreover, the government's failure to find petitioner for eight years caused him no anxiety, did not result in the loss of his liberty, and did not in any way prejudice his defense. Under these circumstances, the Sixth Amendment does not require that petitioner be granted complete absolution for a serious crime that he has admitted committing.

In *Barker* v. *Wingo*, 407 U.S. 514 (1972), this Court set out a four-part test for determining whether the delay between the initiation of criminal proceedings and the beginning of trial violates a defendant's Sixth Amendment right to a speedy trial. The test requires the court to consider the length of the delay, the cause of the delay, the defendant's assertion of his right to a speedy trial, and the presence or absence of prejudice resulting from the delay. 407 U.S. at 530-533. In our view, none of these factors supports petitioner's speedy trial claim.

A. Because Petitioner Was Not Held To Answer For The Charges Against Him, The Period Of Delay Does Not Support His Speedy Trial Claim

In *Barker* v. *Wingo*, the Court treated the period of delay as a "triggering mechanism." That is, until "there is some delay that is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." 407 U.S. at 530. The Court was quick to point out, however, that the delay factor is not a rigid one. Rather, "the length of delay that will provoke such an inquiry [into the other factors] is necessarily dependent upon the peculiar circumstances of the case." 407 U.S. at 530-531.

The eight-year delay between the indictment and the trial proceedings in this case was, of course, quite long. But what is most important in assessing the length of the delay in this case is that petitioner was not arrested until September 1988 and claims not to have been aware of the indictment until that time.[8] He was therefore not in custody or subject to bail during that entire eight-year period. Moreover, in light of his claim that he did not know about the indictment until the day of his arrest, he was not even subject to the anxiety or humiliation that may accompany a pending charge of which the defendant is aware.[9]

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[8] Petitioner does not contend that the period between his arrest in September 1988 and his plea of guilty in February 1989, most of which was devoted to litigation of his dismissal motion, was improper or contributes in any way to his speedy trial claim.

[9] Of course, if petitioner was aware of the charges against him, his constitutional claim would be very weak because of his failure to come forward and request a speedy trial. See

The Court frequently has noted the significance of the date of arrest to claims under the Speedy Trial Clause: "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends." *United States* v. *Marion*, 404 U.S. 307, 320-321 (1971). Thus, the Court has held that an arrest is sufficient to implicate the Clause, even in the absence of a formal indictment. See *Dillingham* v. *United States*, 423 U.S. 64, 65 (1975).

The converse is also true. Unless the defendant is arrested or otherwise held to answer on criminal charges, the core concerns of the Speedy Trial Clause are not implicated.[10] As the Court has explained, the "major evils" against which the Clause protects are "undue and oppressive incarceration prior to trial, [and] anxiety and concern accompanying public accusation."[11] *Marion*, 404 U.S. at 320. See *United*

Barker, 407 U.S. at 532 ("We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."); *id.* at 536 ("[B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates * * * that the defendant did not want a speedy trial.").

[10] Although the historical materials relating to the Speedy Trial Clause are "sparse and unilluminating," *Marion*, 407 U.S. at 314 n.5, the Court has noted that the English Habeas Corpus Act of 1679, 31 Car. 2, ch. 2, a principal predecessor of the Clause, "does not allude to delay before arrest." *Marion*, 407 U.S. at 314 n.6.

[11] *Marion* explained that a third goal of the Speedy Trial Clause is to "limit the possibilities that long delay will impair

States v. *Loud Hawk*, 474 U.S. 302, 311 (1986) ("The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges."); *id.* at 312 (the "Speedy Trial Clause's core concern is impairment of liberty").

These concerns are not implicated in this case. The situation of the defendant who is unaware of the charges against him, "does not compare with that of a defendant who has been arrested and held to answer." *Marion*, 404 U.S. at 321.[12] Although not

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the ability of an accused to defend himself." 407 U.S. at 320. But the Court went on to explain that this concern—which it did not view as one of the "major evils" addressed by the Clause, *ibid.*—is dealt with adequately by statutes of limitations and other mechanisms, and thus, standing alone, is insufficient to justify expansion of the Clause's reach. *Id.* at 322-323; see *United States* v. *MacDonald*, 456 U.S. 1, 8 (1982) ("The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations."). In any event, the lower courts found, and petitioner's guilty plea establishes, that there was no prejudice to petitioner's ability to prove his innocence in this case.

[12] Perhaps the best illustration of the principle that the assessment of a period of pretrial delay depends on the defendant's circumstances is the case of the defendant who avoids arrest and prosecution by leaving the country or remaining outside the country after charges are brought. Such a person should seldom, if ever, be entitled to make a claim under the Speedy Trial Clause, just as he cannot insist on the benefits of the statute of limitations. See *Streep* v. *United States*, 160 U.S. 128, 133 (1895) ("any person who

directly on point, the *MacDonald* and *Loud Hawk* cases are the most helpful authorities from this Court on the issue.

In *United States* v. *MacDonald*, 456 U.S. 1 (1982), military charges against the defendant were dismissed in 1970. Although military and civilian investigations continued, civilian charges were not filed until 1975. The Court held that the five-year period between the dismissal of the military charges and the filing of the civilian charges should not be counted in determining the length of the pretrial delay. During the intervening period, the Court explained, MacDonald "was not under arrest, not in custody, and not subject to any 'criminal prosecution.'" 456 U.S. at 10. "He was free to go about his affairs, to practice his profession, and to continue with his life." *Ibid.* The reinstated charges therefore were not subject to dismissal on the ground that the government had failed to comply with its constitutional obligation to provide MacDonald with a speedy trial, even though he was subject to "undesirable consequences flowing from the initial accusation by the Army and the continuing investigation after the Army charges were dismissed." *Ibid.*

In *Loud Hawk*, the district court twice dismissed the indictment, and the government twice had the dismissals overturned on appeal. The issue before this Court was whether the time during which the case was on appeal was to be counted as part of the period of pretrial delay for purposes of the Speedy Trial Clause. The Court held that even though the government was pursuing appeals during that

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takes himself out of the jurisdiction, with the intention of avoiding being brought to justice for a particular offence, can have no benefit of the limitation, at least when prosecuted for that offence in a court of the United States").

period, the time should not be counted for speedy trial purposes, because the defendants were not subject to restraints on their liberty; their situation did not "compare with that of a defendant who has been arrested and held to answer." 474 U.S. at 311. The Court therefore concluded that "when defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weigh that time towards a claim under the Speedy Trial Clause." 474 U.S. at 312.

This case differs from *MacDonald* and *Loud Hawk* in that the indictment in this case was pending throughout the period between 1980 and 1988, while in those cases the charges had been dismissed, either by the government or by the court. Nonetheless, the Court's analysis of the interests protected by the Speedy Trial Clause and the critical role of restraint on liberty in that analysis is instructive here. Because petitioner was not incarcerated and was under no restriction on his liberty during the period between 1980 and 1988,[13] *MacDonald* and *Loud Hawk* suggest that that period should be disregarded, or at least significantly discounted, in the speedy trial calculus. In fact, because petitioner claims not to have been aware of the indictment, he did not experience the anxiety and expense suffered by the defendants in *MacDonald* and *Loud Hawk* while they were awaiting the reinstatement of the charges against them; in that sense, there is an even stronger argument here

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[13] The period of petitioner's incarceration in Panama cannot, of course, be charged as a restraint on liberty attributable to the United States, because he was held there for violations of Panamanian law.

than in those cases that the eight-year period of delay should not be charged against the government.

The Speedy Trial Act of 1974 underscores the significance that attaches to the fact of arrest in the speedy trial context. When Congress sought "to make effective the sixth amendment right to a speedy trial," S. Rep. No. 1021, 93d Cong., 2d Sess. 1 (1974), it provided that the statutory clock would run from the date the indictment was made public or "the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. 3161(c)(1). In other words, the statutory speedy trial guarantee is not activated until the defendant has been held to answer on the charges; return of the indictment alone does not start the 70-day clock. *United States* v. *Hermanski*, 861 F.2d 1240, 1241 (11th Cir. 1988), cert. denied, 490 U.S. 1084 (1989); *United States* v. *Montoya*, 827 F.2d 143, 152 (7th Cir. 1987); *United States* v. *Thirion*, 813 F.2d 146, 153 (8th Cir. 1987).[14] Although Congress's judgment as to the critical stage for triggering speedy trial concerns does not govern the scope of the constitutional provision, it provides useful guidance from a coordinate branch of government in applying the speedy trial guarantee to the facts of particular cases.

In sum, under the circumstances presented here, petitioner is not entitled to the presumption of prejudice that normally would attend a delay of the length

[14] The same result would be reached under Federal Rule of Criminal Procedure 48(b), which was the exclusive non-constitutional speedy trial provision before the enactment of the Speedy Trial Act of 1974. As the *Marion* Court noted, the "rule clearly is limited to post-arrest situations." See *Marion*, 404 U.S. at 319.

involved in this case. Indeed, because petitioner was not deprived of his liberty or otherwise subject to restraint during the period of delay, petitioner is in the same position he would have been in if his indictment had not been returned shortly after the crime (as it was), but had been delayed until shortly before the expiration of the statute of limitations. In that event, the length of the delay between indictment and arrest would have been much shorter, but the effect of the delay on petitioner would have been the same. Under either scenario petitioner was subject to none of the restraint, anxiety, and embarrassment that the Speedy Trial Clause was designed to minimize. Thus, because the eight-year period between indictment and arrest did not implicate any of the core concerns of the Clause, the length of the delay does not justify dismissal of the indictment.

B. The Government Cannot Be Charged With Responsibility For The Delay

The second factor from *Barker* v. *Wingo*—the cause of the delay—also does not favor petitioner. It is true that the government generally has a duty to make a diligent, good-faith effort to bring an indicted defendant to trial promptly. See *Smith* v. *Hooey*, 393 U.S. 374, 383 (1969). But the burden imposed by that rule must be evaluated in light of the facts of the cases in which the burden has been acknowledged; in all those cases the government knew the defendant's whereabouts and had the ready and unquestioned capacity to bring the defendant before its courts. See, *e.g.*, *Dillingham* v. *United States*, 423 U.S. 64 (1975); *Dickey* v. *Florida*, 398 U.S. 30 (1970); *Smith* v. *Hooey*, *supra*; *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967). Close scrutiny of the government's efforts in those circumstances makes

sense, because the steps the government must take to conclude the proceedings are relatively straightforward and easy for a court to identify.

In contrast, if the defendant's whereabouts are unknown, the government's task is much more difficult, and the steps that will lead to the defendant's capture are less certain. Where apprehension of the defendant is delayed, it will often be easy to criticize the government's search efforts as misguided or taking too long. But such criticisms may ignore limitations on technology and manpower, as well as the agency's need to allocate resources to other investigations. The Speedy Trial Clause should not serve as a standing invitation to courts to second-guess agency decisions regarding the utility and cost of techniques used to locate fugitives.[15] Accordingly, the absence of a defendant ordinarily should be considered a valid reason for delay without the need for close and critical scrutiny of the techniques the government used to find him.

In any event, the government's efforts to find petitioner did not reflect negligence, and certainly did not reflect gross negligence, as petitioner contends. For the first month after the indictment, no attempts were made to arrest petitioner, because the government was attempting to entice other defendants into the country without alerting them to the pendency of the indictment. As the magistrate found, that was a valid reason for delay. Pet. App. 30-31. Then, on March 18, 1980, North Carolina police officers went

[15] The magistrate in this case engaged in just such second-guessing when he reviewed the government's assessment of the expense, burden, and value of various investigative techniques, J.A. 38-42, 52, and criticized what he perceived to be the lack of technological sophistication on the part of federal investigative agencies, Tr. 255.

to petitioner's home to make the arrest. The officers were met by petitioner's mother who told them that petitioner was en route to Colombia to buy drugs. Petitioner's mother cooperated with the police; she told them that drugs were ruining her son and that she had tried to have him arrested before. She promised that she would advise the officers when petitioner returned home. In light of Mrs. Doggett's cooperative attitude and firm promise of future assistance, Agent Driver reasonably believed that if petitioner returned to North Carolina, he would hear about it.

Also on March 18, 1980, Agent Driver entered petitioner's name in the TECS computer [16] and alerted Interpol and all U.S. Customs Stations. He later entered petitioner's name in the NCIC computer as well.[17] Having taken those steps, Agent Driver reasonably believed that if petitioner returned to the United States, he would be apprehended at the border. See *United States* v. *Blanco*, 861 F.2d 773, 778 (2d Cir. 1988) (government was diligent in its efforts

[16] The TECS notation may have been cancelled automatically before petitioner reentered the country, but if so, the cancellation was not the fault of Agent Driver or anyone else connected with this case.

[17] Petitioner criticizes Agent Driver's failure to have petitioner's name immediately entered into NCIC. Pet. Br. 6. As the court of appeals noted, however, Agent Driver's actions in this regard had no effect on the government's inability to locate petitioner, because the NCIC entry was made before petitioner entered the country, and it was still in effect when he did enter. The NCIC entry did not cause petitioner to be detained at the border because petitioner entered the country at John F. Kennedy Airport in New York. Because of the great number of persons entering at that point, customs officers there can do no more than conduct random NCIC checks on entering persons. See Pet. App. 36, 82 n.8.

to bring defendant to trial where defendant remained in Colombia for ten years and the government entered her name in the TECS and NCIC computers so that she could be arrested when she reentered the United States), cert. denied, 489 U.S. 1019 (1989).

When petitioner was arrested for smuggling drugs into Panama in September 1981, Agent Driver secured a written commitment from the Attorney General of Panama that Panama would expel petitioner to the United States after his prosecution and imprisonment there were over. Agent Driver employed the same procedures that our government normally uses to obtain custody of criminal defendants from Panama. He therefore reasonably assumed that petitioner would be delivered into United States custody upon his release from his Panamanian sentence. As the district court noted, see Pet. App. 31-33, Agent Driver cannot be criticized for failing to anticipate that the Panamanian government would allow petitioner to go free without complying with its commitment to produce him to United States authorities.[18] See *United States* v. *Bagga*, 782 F.2d 1541, 1543-1544 (11th Cir. 1986) (government made a

[18] Petitioner suggests (Pet. Br. 6) that the government should have attempted to extradite petitioner from Panama. But Agent Driver acted reasonably in relying on the advice of the DEA representative in Panama in choosing a more informal route. The expulsion procedure had worked in other cases, both before and after petitioner's arrest in Panama. See J.A. 29. Also, the DEA representative who advised Agent Driver told him that extradition was not customarily used in these situations. Tr. 47-48. Once the DEA advised Agent Driver that the Attorney General of Panama had agreed in writing to release petitioner to the United States, it was reasonable for him to believe that everything possible had been done to apprehend petitioner.

good-faith, but unsuccessful, effort to secure defendant's return from India).

The record rebuts petitioner's assertion that the government should have used driver's license and credit checks to find petitioner. Agent Driver and a representative of the United States Marshals Service testified at the hearing that those techniques are burdensome and generally ineffective. J.A. 38-42, 52; Tr. 149, 160-162. The clearest indication of their low level of effectiveness is that, although the program under which petitioner was finally located used all available techniques, including driver's license and credit checks, the program located only 225 of about 8,000 fugitives who were being sought under the program. Tr. 153. That result is not surprising, as common sense suggests that most fugitives are likely to use false names or otherwise avoid exposing themselves to discovery through such name-search devices.[19]

Finally, petitioner cannot reasonably blame the government for not continuing to make intensive efforts to find him during the entire eight-year period between indictment and arrest. After a period of time, a law enforcement agency may reasonably conclude that further efforts to locate an individual are [redacted] likely to have diminishing prospects of success. When a case reaches that stage, it is not surprising that a person who continues in fugitive status is most likely to be located only if he is arrested on another

[19] Petitioner suggests (Pet. Br. 16, 26) that the government has a duty to advise fugitives of indictments pending against them, and that the duty was violated here. As a general matter, of course, the government cannot notify persons it cannot find. In any event, the government went to petitioner's last known address and advised his family of the indictment, so any such duty was satisfied here.

charge or found through "fugitive sweep" programs such as the one that located petitioner.

In sum, petitioner's departure from the country in 1980 put him beyond the reach of government authorities and thus was a "valid reason" for the delay in arresting him. *Barker*, 407 U.S. at 531. Even if the government's search efforts in this case are regarded as inadequate or sloppy, negligence is only a neutral factor in the *Barker* balancing test. *Ibid.* Therefore, the cause of the delay is either chargeable against petitioner or, at worst, is a neutral factor that cannot be weighed against the government.

C. Petitioner Has Not Met His Burden Of Explaining Why He Did Not Assert His Right To A Speedy Trial

The third factor described in *Barker* is the defendant's assertion of his right to a speedy trial. The Court explained that a defendant has the "responsibility to assert a speedy trial claim," 407 U.S. at 529, and noted that the lack of a demand is "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right," *id.* at 531-532. The Court added that the "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532.

Petitioner made no demand for a speedy trial, and he failed in the district court to explain why he did not do so. Petitioner argues here, as he argued in the court of appeals, that the government failed to prove that he was aware of the indictment, and therefore failed to show that he had any reason to request a speedy trial. The burden, however, was on petitioner to show that he satisfied his "responsibility to assert a speedy trial claim," *Barker*, 407 U.S. at 529. Just as a defendant who seeks the exclusion of illegally

seized evidence must prove that he had a protected Fourth Amendment interest in the place searched or the property seized, see *Rakas* v. *Illinois*, 439 U.S. 128, 148-149 (1978), a defendant who claims that his right to a speedy trial has been violated must either show that he demanded a trial or explain how he was prevented from asserting his right. See *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984) (defendant must show violation of Sixth Amendment right to assistance of counsel). It is entirely reasonable to put the burden on the defendant to establish why he did not assert that right, because the defendant is in the best position to know the true reason for his actions. See *Casey* v. *United States*, 276 U.S. 413, 418 (1928); *United States* v. *Denver & Rio Grande R.R.*, 191 U.S. 84, 91-92 (1903); 9 J. Wigmore, *Evidence in Trials at Common Law* § 2486, at 290-292 (J. Chadbourn rev. 1981).

The facts of this case strongly suggest that the reason petitioner did not testify that he was unaware of the indictment was because that testimony would not have been true. Two of his associates, William Barnes and Allen Riddle, were arrested on the indictment, tried, and convicted in 1980, and members of petitioner's family knew of those proceedings. Whether or not petitioner communicated with Barnes and Riddle following their arrests, it is difficult to believe that neither petitioner's family nor his associates in the drug trade told him about their arrests. In addition, there is nothing in the record to explain why petitioner returned to Colombia after his release from jail in Panama, unless he was seeking to avoid arrest in the United States. Nor does the record explain why petitioner avoided any contact with his parents in Raleigh for more than a year after he reentered the United States in 1982.

The evidence at the hearing showed that his parents did not even know he was in the country, although he was living nearby and became engaged and married during that time. These facts suggest that petitioner knew of the charges against him and hoped that the government would not find him.

In light of the circumstantial evidence suggesting knowledge of the indictment on petitioner's part, petitioner's evidence that he was not aware of the indictment falls far short of satisfying his burden of proof of showing his lack of knowledge. On that issue, petitioner offered only the testimony of his mother, who said that she had not told him about the indictment, Tr. 175-178, and his wife, who said petitioner did not tell her of the indictment, Tr. 202. Even if credited, that evidence falls far short of establishing that petitioner did not learn of the indictment from any source. Because petitioner failed to satisfy his burden of showing a justification for not requesting a speedy trial, his legal position should be the same as that of a defendant who was aware of the charges against him but who made no request to be tried.[20] For that reason, the third *Barker* factor, like the first two, does not support petitioner's claim of a speedy trial violation.

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[20] This position is not contrary to the findings below. The district court found that there was no evidence that petitioner knew about the indictment and assumed that the government bore the burden of proving knowledge. Pet. App. 42-43. The court of appeals mischaracterized the district court's finding of no evidence as a finding that petitioner was unaware of the charges. *Id.* at 86-87, 89-90.

D. Petitioner Was Not Prejudiced In Any Way By The Delay Between Indictment And Arrest

The final *Barker* factor is prejudice to the defendant. The court of appeals was correct in holding that prejudice—or the absence of prejudice—is the most important factor for speedy trial analysis. In determining the proper remedy for constitutional violations (or, in some instances, determining whether there was a violation at all), this Court has focused sharply on the prejudice that the challenged conduct caused the defendant. See, *e.g.*, *United States* v. *Morrison*, 449 U.S. 361, 365-367 (1981) (rejecting dismissal of indictment as an appropriate remedy for an intentional interference with the defendant's right to counsel that did not prejudice the defendant); *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (proof of prejudice is generally a necessary, but not sufficient, condition of dismissal for pre-indictment delay); *Strickland* v. *Washington*, 466 U.S. 668 (1984) (showing of prejudice to defense is a necessary component of claim of ineffective assistance of counsel); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 873 (1982) (to establish violation of Sixth Amendment right to compulsory process, defendant must make a plausible showing that deported witnesses' testimony would have been material and favorable to the defense); *Brady* v. *Maryland*, 373 U.S. 83 (1963) (suppression of evidence that is material to guilt or punishment violates due process, regardless of good faith of the prosecution).

The same analysis applies to constitutional speedy trial claims. In fact, because in the speedy trial context dismissal "is the only possible remedy," *Barker*, 407 U.S. at 522, courts should be especially reluctant to grant relief in the absence of any showing of prejudice to the defendant. A delay in the trial that

works no injury of any sort on the defendant—or even aids the defendant in some respect—is difficult to characterize as action that denies the defendant the "enjoy[ment]" of his "right to a speedy and public trial."

This is not to say that prejudice is always required as a condition of finding a speedy trial violation. The Court in *Moore* v. *Arizona*, 414 U.S. 25 (1973), explained that it has "rejected the notion that an affirmative demonstration of prejudice [i]s necessary to prove a denial of the constitutional right to a speedy trial." *Id.* at 26. But even though prejudice is not, in effect, the controlling factor in finding a speedy trial violation, this Court's decisions have identified it as a very important ingredient of the speedy trial claim.[21] In all of the cases in which this Court has granted relief under the Speedy Trial Clause, the defendants suffered some form of prejudice. See *Dillingham* v. *United States*, 423 U.S. 64 (1975) (per curiam) (petitioner detained 22 months before indictment and trial); *Moore*, 414 U.S. at 25 (petitioner was subject to a prison detainer); *Dickey* v. *Florida*, 398 U.S. 30, 32 (1970) (petitioner was subject to a detainer); *Smith* v. *Hooey*, 393 U.S. 374, 378 n.8 (1969) (petitioner apparently was subject to a detainer); *Klopfer* v. *North Carolina*, 386 U.S. 213, 218 (1967) (pendency of indictment interfered with petitioner's work). When there has been no

[21] Although we believe the absence of prejudice will almost always defeat a speedy trial claim, dismissal of an indictment, even in the absence of an actual showing of prejudice, might be justified if, for example, the government caused a lengthy delay for the specific purpose of prejudicing the defendant's ability to defend himself or injuring the defendant in some other significant way. Cf. *Arizona* v. *Youngblood*, 488 U.S. 51 (1988).

such injury, it is difficult to justify terminating society's right to vindicate its interest in punishing the commission of crime.

There is no merit to petitioner's suggestion (Pet. Br. 23-24) that prejudice should be presumed if a defendant does not waive his speedy trial right and is not brought to trial for a period equal to the applicable statute of limitations. Nothing in this Court's cases would justify a bright-line rule focusing solely on the passage of time. *Barker* firmly held that courts are in no position to prescribe precise time periods within which defendants must be brought to trial. 407 U.S. at 522-523. And petitioner is incorrect to suggest (Pet. Br. 24) that his proposed rule gains support from *Marion*. In *Marion*, the Court held that time periods before indictment or arrest are not covered by the Speedy Trial Clause. It referred to statutes of limitations only to point out that they are the principal mechanism by which the law protects against "prejudice resulting from the passage of time," 404 U.S. at 322, and thus to justify the Court's holding that the Speedy Trial Clause had not been violated.

In determining whether there was prejudice in this case, petitioner's claims "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532. The Court then identified three such interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Ibid.* Petitioner does not claim that he suffered either of the first two forms of prejudice, and the record rebuts any claim that he suffered the third.

Petitioner suggests (Br. 21) that because 17 tape recordings were lost and because one potential witness may have been unavailable, he may have lost some exculpatory evidence. As both of the courts below recognized, Pet. App. 48-49, 95-97, his claims of prejudice to his defense are purely speculative. Because the tape recordings were made in the course of the government's undercover investigation, it is far more likely that the missing items would have confirmed petitioner's guilt. See *Loud Hawk*, 474 U.S. at 315 (noting that delay can be "a two-edged sword" because the "passage of time may make it difficult or impossible for the Government" to prove its case).

In any event, it is not necessary in this case to speculate about whether the period of delay has deprived petitioner of an opportunity to establish his innocence. By pleading guilty to the conspiracy charge, petitioner has admitted every element of the offense and disclaimed any possible assertion of factual innocence. *United States* v. *Broce*, 488 U.S. 563, 569 (1989). The absence of "trial prejudice" has therefore been established conclusively here.

At the heart of petitioner's submission to this Court is a claim of prejudice different from those identified in this Court's earlier speedy trial cases: the disruption of petitioner's life caused by a belated arrest for crimes committed long ago. See Pet. Br. 19. Arguably this interest in repose does not implicate a type of prejudice cognizable under the Speedy Trial Clause. See *MacDonald*, 456 U.S. at 8 (the harm caused by the passage of time "is protected primarily by the Due Process Clause and by statutes of limitations"); see *Marion*, 404 U.S. at 322. But even if this interest is cognizable under the Speedy Trial Clause, we do not believe it is implicated

here, because on the facts of this case, the delay benefited petitioner much more than it injured him. At the time of his arrest, petitioner had been living an apparently normal, law-abiding life for some five years, a point that was not lost on the sentencing judge. Thus, the delay in this case gave petitioner the time and opportunity to prove what most defendants can only promise: that he is no longer a threat to society. There is little doubt that petitioner would have received a harsher sentence if he had been tried while he was still trafficking in cocaine.

Petitioner is not seeking to be put back where he would have been had he been tried promptly after his serious drug offenses; rather, he is trying to take advantage of the government's inability to locate him to improve his position. The only adverse effects of this prosecution on petitioner (other than the inconvenience and expense of having to defend against the charges) are a $1,000 fine, a three-year term of probation, and a criminal record. If the government had been able to locate him and bring him to trial promptly after his offense, he almost surely would have suffered each of those consequences, and probably a prison term to boot. Because petitioner is no worse off than he would be if he had been prosecuted within weeks of his indictment, he has not been "prejudiced" by the delay, even assuming that the Speedy Trial Clause is designed in part to serve interests of repose equivalent to those served by statutes of limitations in the preindictment setting. The Constitution therefore does not require that petitioner receive the windfall of complete absolution for his crimes simply because of the delay in effecting his arrest.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfuily submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

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In The

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October Term, 1990

MARC GILBERT DOGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United Stated Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

Wm. J. Sheppard
Elizabeth L. White
Sheppard and White, P.A.
215 Washington Street
Jacksonville, Fl. 32202
(904) 356-9661

Counsel for Petitioner

July 15, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

WHEN THE FOUR FACTORS SET FORTH IN *BARKER v. WINGO*, ARE BALANCED AS A WHOLE, PETITIONER IS ENTITLED TO DISMISSAL OF THE CHARGES AGAINST HIM.

In apparent recognition of the weakness of its position, the Government now seeks to change the facts that have been clearly established in this case. Findings of fact have been made, which are well supported by the record. These facts include a conclusive finding by both the district court and the Eleventh Circuit Court of Appeals that Mr. Doggett was not aware of the indictment pending against him. [J.A. 73, 107-108, Pet. App. 66]. The Government ignores these findings of fact, along with the undisputed fact that for approximately six years prior to his arrest Mr. Doggett lived openly and continuously in the community,[1] and instead, argues the existence of "circumstantial evidence" relative to his knowledge. It does so because it is well aware that the state of this record compels a finding that Mr. Doggett's right to a speedy trial has been violated.

Initially, the Government advances the meritless argument that the length of delay was not presumptively prejudicial. [Resp. Brief, 18-19]. It further argues that during the period between his indictment and arrest, Mr. Doggett was not subject to the "restraint, anxiety, and embarrassment that the speedy trial clause was designed

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[1] This fact alone certainly belies the Government's assertion that petitioner failed to present any "direct evidence" that he did not know of the indictment against him. [Resp. Brief, 6].

to minimize." [Resp. Brief, 19]. On this reasoning, it concludes, "[t]he eight-year period between indictment and arrest did not implicate any of the core concerns of the clause, [and] the length of the delay does not justify dismissal of the indictment." [Resp. Brief, 19]. The respondent's reasoning demonstrates its misunderstanding of the "length of the delay" analysis delineated by this Court in *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972).

In *Barker*, this Court held, "The length of the delay is to some extent a triggering mechanism." 407 U.S. at 530. It reasoned that whether a delay was prejudicial is necessarily dependent upon the particular circumstances of a given case. *Id.* In referring to the circumstances of a case, this Court looked to the issue of whether the Government was justified in delaying a prosecution. Under *Barker*, the factors of prejudice and likely harm to the defendant are to be considered separately from the length of delay analysis. Thus, the Government incorrectly confuses length of delay with harm to the defendant by the delay.

As the Eleventh Circuit Court of Appeals noted below, "The Government . . . *conceded* that the length of delay is presumptively prejudicial." [Pet. App. 79] (Emphasis added). The Government now attempts to revoke what it conceded below. The Government also argues that *United States v. MacDonald*, 456 U.S. 1 (1982), lends support to its position that the length of delay in this case was not presumptively prejudicial. This Court granted certiorari in *MacDonald* to resolve, "[w]hether the time between dismissal of military charges and a subsequent indictment on civilian criminal charges should be considered in determining whether the delay in bringing respondent to trial for the murder of his wife and two

children violated his rights under the Speedy Trial Clause of the Sixth Amendment." *Id.* at 3. This Court found in *MacDonald* that the dismissal of military charges removed any restraint on the defendant's liberty, any disruption of his employment, any strain on his financial resources, exposure to public obloquy, and that the stress and anxiety present were no greater than that faced by the subject of any criminal investigation. *Id.* at 9. This Court concluded that the petitioner was "legally and constitutionally in the same posture *as though no charges had been made*" during the intervening period between dismissal of the military charges and initiation of civilian criminal charges. *Id.* at 10 (Emphasis added). Accordingly, this Court held that the intervening period at issue should not be considered in the length of delay analysis.

The *MacDonald* case clearly differs from that before this Court in that Mr. Doggett was under an indictment during the approximate eight and one-half year period between indictment and arrest. This Court long ago resolved that the period between indictment and arrest must be considered in evaluating a speedy trial clause claim. *Dillingham v. United States*, 423 U.S. 64, 65 (1975). Thus, none of the cases cited by the Government support its contention that the extraordinary delay between Mr. Doggett's indictment and arrest was not presumptively prejudicial.

The Government also cites *United States v. Loud Hawk*, 474 U.S. 302 (1986), for the proposition that the extraordinary delay in this case should be "disregarded, or at least significantly discounted, in the speedy trial calculus." [Resp. Brief, 17]. In *Loud Hawk*, this Court dealt with the

question of whether time during which the defendants were neither under indictment nor subject to any official restraint, and time which accrued due to delays occasioned by interlocutory appeals, should be considered within the length of delay prong of the speedy trial analysis. The defendants in *Loud Hawk* were arrested on November 14, 1975, and indicted by a federal grand jury on November 25, 1975. *Id.*, at 305-06.

Subsequently, the grand jury returned a superseding indictment against the defendants on December 22, 1975. *Id.* at 306. The district court then granted a motion to suppress and the Government appealed the suppression order. It also moved that the trial be continued on all counts pending the outcome of the appeal. *Id.* at 307. The district court subsequently dismissed the indictment with prejudice pursuant to Fed.R.Crim.P. 48(b), because the Government was not ready when the case was called for trial. *Id.* The Government immediately appealed the dismissal and the two appeals were consolidated. *Id.* at 307-08. The court of appeals then reversed the suppression order and held dismissal of the charges had been improper. *Id.* at 308.

Upon remand and issuance of a new indictment, the defendants filed voluminous motions including a motion alleging vindictive prosecution. *Id.* at 308-09. The latter motion resulted in yet another dismissal of the prosecution, a result thereafter reversed by the court of appeals. *Id.* at 30. When the case was returned to the district court, it dismissed the indictment on speedy trial grounds. *Id.* It was in this procedural posture that *Loud Hawk* was presented to this Court.

Relying on the *MacDonald* decision, this Court in *Loud Hawk* held that because the defendants were neither under indictment nor subject to any substantial restrictions on their liberty, that the period of time pending appeal of the initial dismissal should not be considered under the "length of delay" prong of the speedy trial analysis. *Id.* at 312. Significantly, this Court further found that a ninety month delay caused by interlocutory appeals brought by both the defendant and the Government was "presumptively prejudicial . . . and serve[d] to trigger application of *Barker*'s other factors." *Id.* at 314. This Court calculated the ninety month delay due to interlocutory appeals in its length of delay calculus because the defendants had been subject to indictment or restraint during that period. *Id.* at 312.

It therefore left no doubt that indictment serves to trigger commencement of the speedy trial clock. In this case, Mr. Doggett was unquestionably under indictment during the entire eight and one-half year span in question. Thus, the Government's attempted revocation of its prior concession that this time period was presumptively prejudicial and its attempt to assert that this period should not have triggered the *Barker* analysis, are both wholly unfounded.

The Government contends that the reason for the delay prong of the *Barker* analysis should not weigh against it because:

> The Speedy Trial Clause should not serve as a standing invitation to courts to second guess agency decisions regarding the utility and cost of techniques used to locate fugitives. Accordingly, the absence of a defendant ordinarily

> should be considered a valid reason for delay without the need for close and critical scrutiny of the techniques the government used to find him.

[Resp. Brief, 20] (footnote omitted). It argues that the magistrate in this case erred in "second guessing" the Government's assessment of the expense, burden, and value of the various investigative techniques. [Resp. Brief, 20, n.15]. An examination of the magistrate's analysis reveals that he justifiably was baffled by the ease with which state agencies use technological means to gather information, while agencies of the federal government appear to be floundering in ineptness and unsophistication. [Tr. 253-56]. He specifically questioned whether one government agency could be held accountable for the ineptness of another agency when rendering his decision. [Tr. 253].

He ultimately concluded that the Government failed to locate Mr. Doggett subsequent to his release from Panamanian custody due to a "breakdown in communication between government agencies." [Pet. App., 33-34]. He further concluded that, "[t]he failure to apprehend Doggett upon his release from Panama could be attributed to nothing more than *'bureaucratic negligence.'* " [Pet. App., 35] (Emphasis added). In a revealing footnote the magistrate stated:

> The Court does not have sufficient facts to establish whether or not the DEA's failure to discover Doggett's release was the direct result of the State Department or its own negligence. This raises an interesting question as to whether or not the negligence of another agency can be

> attributed to the law enforcement agency seeking the apprehension of the fugitive. Valid arguments could be made for each side. It could be argued that although the delay did not emanate from the direct action by the law enforcement officers, it should be nonetheless chargeable to the government because it results from a breakdown in the system that inevitably results in delay. On the other hand, it could be argued that errors made by helping agencies should not be chargeable if there was a reasonable good faith belief the helping agency was conducting a proper investigation. Otherwise, the agency responsible for the search would be held accountable to conduct every conceivable type of nationwide hunt.

[Pet. App., 35, n.10]. He concluded that the delay in arresting the petitioner was due to "negligence and was not intentionally done for tactical reasons. . . . " [Pet. App., 40]. Likewise, the Eleventh Circuit Court of Appeals found that, "[t]he Government's efforts to apprehend Doggett were negligent. . . . " [Pet. App. 85].

With these facts clearly established, the Government incredulously misstates a number of facts in an attempt to establish due diligence. For example, it contends:

> The record rebuts petitioner's assertion that the government should have used driver's license and credit checks to find petitioner. Agent Driver and a representative of the United States Marshals Service testified at the hearing that those techniques are burdensome and generally ineffective. J.A. 38-42, 52; Tr. 149, 160-162.

[Respondent's Brief, 23]. In fact, Agent Driver did not testify for the Government that it was truly "burdensome" or "ineffective" to run driver's license and computer checks. Rather,

he merely testified that it took a certain level of expertise to run such a check and that he did not "have the time to do that routinely and regularly." [J.A. 39-40].

Nowhere in the record is there any testimony to indicate that such a procedure is ineffective. The Government contends that because it was generally unsuccessful in apprehending fugitives sought in the program that resulted in the Petitioner's arrest, such techniques are ineffective. [Respondent's Brief, 23]. This contention is meaningless since there is no indication what the status of most of these individuals was, such as whether they were foreign nationals or were intentionally avoiding prosecution. Contrary to the Government's assertion, it is neither difficult nor time consuming to run a credit check on any individual. The ease with which the Government located the petitioner at the residence where he had been living openly for six years is the best evidence of this fact. It is undisputed that the Government located Mr. Doggett within thirty minutes utilizing this technique. [J.A. 94-95].

The Government would also have this Court ignore the undisputed fact that the agent in charge of the petitioner's apprehension submitted a series of false reports over a three-year period which reflected that the petitioner remained incarcerated in Panama based solely on the agent's erroneous "assumption". [J.A. 57-63, 73, 84, 89-90; Pet. App. 70-71]. The Government argues that Mr. Doggett be held accountable for his actions but does not want to be held accountable for its own ineptness and incompetence – or perhaps worse.

It also argues:

> Petitioner's mother cooperated with the police; she told them that drugs were ruining her son and that she had tried to have him arrested before. She promised that she would advise the officers when petitioner returned home. In light of Mrs. Doggett's cooperative attitude and firm promise of future assistance, Agent Driver reasonably believed that if petitioner returned to North Carolina, he would hear about it.

[Respondent's Brief, 21]. Additionally, it contends, "Whether or not petitioner communicated with [alleged co-conspirators] following their arrests, *it is difficult to believe* that neither petitioner's family nor his associates in the drug trade told him about their arrests." [Respondent's Brief, 25]. (Emphasis added). What the Government "believes" is irrelevant. The facts are as they are. They cannot be changed to suit the Government. This record establishes that the "reason for delay" prong of the *Barker* analysis should be weighted heavily against the Government.

The Government also argues that the assertion of right prong of the *Barker* analysis should weigh against Mr. Doggett. It would have this Court believe that, among other thing, Mr. Doggett was aware of the charges pending against him prior to his arrest. It alleges, "At the hearing on the motion to dismiss the indictment, however, the government presented strong circumstantial evidence that petitioner was aware of the indictment, and petitioner did not introduce any direct evidence to the contrary." [Respondent's Brief, 10]. The facts adduced below simply do not bear out this contention. The Eleventh Circuit Court of Appeals held that Mr. Doggett had no knowledge of the outstanding indictment prior to his arrest. [Pet. App. 73-74, 89]. For this reason, it found that the assertion of right prong in the *Barker* analysis was a neutral factor in weighing the petitioner's speedy trial claim.

Now, however, the Government argues that this Court should reconsider the facts of this case and find that Mr. Doggett was aware of the pending indictment and failed to assert his right to speedy trial until such time as he was arrested. [Resp. Brief, 24-26]. The Eleventh Circuit Court of Appeals correctly adopted the lower court's factual finding that the petitioner was unaware of the pending indictment prior to his arrest. [Pet. App. 86-91]. This finding cannot now be disturbed. Since Mr. Doggett in no fashion waived his right to a speedy trial or otherwise failed to assert it, this factor weighs in his favor.

With respect to this factor, the Government essentially wants it both ways. If an indicted individual is unaware of the indictment against him, he has no right to a speedy trial because he suffers no anxiety due to that pretrial delay. [Resp. Brief, 13]. Conversely, it argues, "Of course, if petitioner was aware of the charges against him, his constitutional claim would be very weak because of his failure to come forward and request a speedy trial." [Resp. Brief at 13, n.9]. Under either scenario, the Government argues no right to a speedy trial exists, a result clearly contrary to this Court's decisions in *Barker* and *Moore v. Arizona*, 414 U.S. 25 (1973). Indeed, it would appear that the only beneficiaries of such a rule would be individuals incarcerated on one charge and facing other charges during incarceration. Such analysis would render the sixth amendment right to a speedy trial meaningless.

In relation to the "prejudice" prong of the *Barker* analysis, the Government contends, but none too clearly, that Mr. Doggett was not prejudiced by the inexcusable delay in this case. While correctly conceding that prejudice has never been a requirement of this Court, the

Government nonetheless contends that Mr. Doggett must establish actual prejudice. [Resp. Brief, 28-29] A showing of actual prejudice has remained but one factor to be examined.

The Government contends that Mr. Doggett was not prejudiced by the disappearance of seventeen tape recordings and the unavailability of one potential witness, arguing, "[i]t is far more likely that the missing items would have confirmed petitioner's guilt." [Resp. Brief, 30]. This reasoning is purely speculative. Recent trials such as that of Washington, D.C. Mayor Marion Barry serve to remind us that tapes can be a two-edged sword; they can serve to hinder a prosecution as well as help it. Not knowing what was on the tapes in this case makes it impossible to determine the extent of prejudice suffered by Mr. Doggett. It is for this reason that he has urged the adoption of a "bright-line" rule.

The proposed rule would place the burden upon the Government to prove an individual who was not aware of a pending indictment, has not been prejudiced by a delayed prosecution whenever an amount of time equal to the statute of limitations has passed between indictment and arrest. Since the Government has acknowledged in its brief that the sixth amendment and the statute of limitations are the primary mechanisms which protect individuals from prejudice, [Resp. Brief, 2], it is difficult to understand its objection to adoption of such a rule. Moreover, adoption of the rule would in no way benefit those who knowingly evade arrest, but would instead ensure the swift administration of justice.

The Government's argument that Mr. Doggett somehow benefited from the delay in this case is ludicrous. During the time in question, Mr. Doggett worked diligently to educate himself, provide for his family and

become a productive member of society. [J.A. 99-113; Pet. App. 14-15]. His efforts have now been impaired by his felony conviction. The benefits to his life as the result of his efforts are his own, and are in no way attributable to the Government. Speculation as to what sentence Mr. Doggett would have received ten years ago serves no useful purpose here and, indeed, ignores the reality that Mr. Doggett could just as easily have been acquitted as convicted.

Finally, citing *United States v. Broce*, 488 U.S. 563, 569 (1989) as authority, the Government asserts, "By pleading guilty to the conspiracy charge, petitioner has admitted every element of the offense and disclaimed any possible assertion of actual innocence." [Resp. Brief at 30]. This blanket assertion is erroneous for two reasons. First, *Broce* does not stand for the broad proposition asserted by the Government and has no applicability to the facts of this case. Second, and perhaps more significantly, the Government's argument ignores the express provisions of Fed.R.Crim.P. 11(a)(2), under which petitioner entered a conditional plea in order to preserve his speedy trial claim for appellate review.

In *Broce*, pursuant to plea agreements the defendants entered outright pleas of guilty (as opposed to conditional pleas) to two indictments alleging conspiracies to commit Sherman Act violations. Specifically, by their pleas they admitted that they entered into an agreement on or about April, 1978 to rig bids on a certain highway project. *Id.* at 565-566. They also admitted to the same course of conduct in July of 1979, with respect to a different project. No appeal was ever taken and the judgments became final. *Id.* at 566. Thereafter, they sought to

vacate their sentences, as to the second indictment, on the grounds that such sentences violated the double jeopardy clause of the fifth amendment. Following lengthy appellate and remand proceedings, the Tenth Circuit Court of Appeals ultimately held that the defendants' guilty pleas did not constitute waivers of their double jeopardy rights[2] and that, because only a single conspiracy existed, defendants' sentences as to the second indictment should be vacated.

Addressing *only* the defendants' double jeopardy claim, this Court held that where a guilty plea is entered voluntarily with advice of counsel and "*has become final,*" collateral attack of that plea is foreclosed. *Id.* at 569 (Emphasis added).This Court specifically noted that the defendants had the opportunity prior to their plea "to challenge the theory of the indictments" but had failed to do so. *Id.* at 571. It therefore held defendants should not have been given the opportunity to mount a collateral attack on their sentences. *Id.* at 572.

Simply put, *Broce* further defined this Court's rule that guilty pleas may not be collaterally attacked if they are voluntarily and intelligently entered and made with the advice of competent counsel. *Broce* has absolutely no application where a defendant has entered a conditional

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[2] In *Ricketts v. Adamson*, 483 U.S. 1 (1987), this Court had previously held that double jeopardy claims are subject to the waiver doctrine.

plea pursuant to Fed.R.Crim.P. 11(a)(2), for the purpose of preserving a dispositive issue for appellate review.

Indeed, an examination of Fed.R.Crim.P. 11(a)(2), clearly forecloses the Government's assertion that Mr. Doggett has in some fashion "disclaimed" his right to challenge the lengthy delay in his prosecution or otherwise waived his right to assert his speedy trial claims. Under the terms of that rule, a conditional plea may be entered only, "[w]ith the approval of the court *and consent of the government* . . . " (Emphasis added). The parties would not presently be before this Court if the required governmental consent had not been given. [J.A. 114; Pet. App. 65].

More significantly, however, the Government has ignored the express language of Fed.R.Crim.P. 11(a)(2), which states, "A defendant who prevails on appeal *shall* be allowed to withdraw the plea." (Emphasis added). Thus, petitioner has "admitted" nothing except that he has avoided, " . . . the necessity for [a] trial . . . which [is] . . . undertaken for the sole purpose of preserving pretrial objections. . . . " *See* Notes of Conference Committee on 1975 Amendments to Rules (House Report No. 94-414). The judgment herein is in no sense final and the *Broce* decision has absolutely no application to this case. Any other interpretation of Fed.R.Crim.P. 11(a)(2) would render it meaningless and serve only to encourage unnecessary trials, an interpretation clearly contrary to its express terms. For this reason, the Government's "interpretation of Mr. Doggett's plea should be rejected by this Court.

CONCLUSION

The Government has misstated the factual record before this Court. It has done so because the facts compel a finding that the first three factors of the speedy trial analysis were met by Mr. Doggett.

Additionally, the Government has conceded that, where the first three factors of the speedy trial analysis have been met, a showing of actual prejudice has not been required by this Court. For this reason, the opinion below should be reversed.

Respectfully submitted,

WM. J. SHEPPARD
(Counsel of Record)
ELIZABETH L. WHITE
SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661

Attorneys for Petitioner

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No. 90-857

In The

Supreme Court of the United States

October Term, 1991

MARC GILBERT DOGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF ON THE MERITS OF PETITIONER ON REARGUMENT

WM. J. SHEPPARD
ELIZABETH L. WHITE
SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, FL 32202
(904) 356-9661

Counsel for Petitioner

January 13, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED ON REARGUMENT:

Whether the history of the Speedy Trial Clause of the Sixth Amendment supports the view that the clause protects a right of citizens to repose, free from the fear of secret or unknown indictments for past crimes, independent of any interest in preventing lengthy pretrial incarceration or prejudice to the case of a criminal defendant?

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SUMMARY OF ARGUMENT

The history of the Speedy Trial Clause of the Sixth Amendment establishes the right is one of long standing which has been jealously guarded for centuries. Indeed: "Some thought the right of speedy trial and similar rights were so clearly a part of our "liberty" that no Bill of Rights was necessary. But the American people wanted to be sure, and gave the right of speedy trial first place in the Sixth Amendment. . . . " *United States v. Provoo*, 17 F.R.D. 183, 196 (D.M. 1955), *aff'd*, 350 U.S. 857 (1955) (footnote omitted).

The right to a speedy trial attached in this case upon the filing of the public indictment. The eight and one-half year delay from indictment to arrest is attributable to the government. The government rather than the petitioner bears the ultimate responsibility for such circumstances. *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

Petitioner had no duty to bring himself to trial. *Id.* at 527; *Dickey v. Florida*, 398 U.S. 30, 38 (1970). Indeed, the petitioner was helpless to demand his right to a speedy trial because the government failed to serve notice of the indictment upon him. The government failed to provide any notice despite the fact that it could have easily done so. This Court should attach a different weight to a situation in which a defendant is without knowledge of a public indictment from one in which the defendant knowingly fails to object or demand his right to a speedy trial.

Inasmuch as it is not necessary that prejudice be shown in order to prove a speedy trial violation, this court should provide petitioner his only possible remedy, reversal and dismissal of the indictment. *Moore v. Arizona*,

414 U.S. 25, 26 (1973); *Strunk v. United States*, 412 U.S. 434, 440 (1973); *Barker*, 407 U.S. at 522. Dismissal is also warranted because petitioner has demonstrated prejudice. During the period of inordinate delay petitioner was leading a normal, productive and law-abiding life. Petitioner had fully integrated himself into society. His arrest and prosecution at this late date interrupted his life as a productive member of society and forced him to answer for actions taken in the distant past. Accordingly, petitioner's conviction should be reversed.

ARGUMENT

THE HISTORY OF THE SPEEDY TRIAL CLAUSE OF THE SIXTH AMENDMENT ESTABLISHES THE RIGHT OF ALL CITIZENS TO REPOSE AND TO BE FREE FROM EXCESSIVE AND UNWARRANTED GOVERNMENTAL DELAY IN THE PROSECUTION OF ANY CRIMINAL INDICTMENT, INDEPENDENT OF ANY INTEREST IN PREVENTING LENGTHY PRETRIAL INCARCERATION OR PREJUDICE TO AN INDICTED CITIZEN.

The history of our Sixth Amendment cannot be disputed. Justice shall be delayed to no citizen. The question of whether a citizen has knowledge of a pending criminal indictment is relevant only where there is a knowing avoidance of prosecution. Justice otherwise has either been delayed or it has not. The history of the Sixth Amendment makes clear that an excessive delay in prosecuting an individual after he has been formally charged, arrested or indicted necessarily must result in dismissal

of such prosecution. *United States v. Marion*, 404 U.S. 307, 325 (1971); *United States v. MacDonald*, 456 U.S. 1, 7 (1982).

In addition, an examination of the history of the Speedy Trial Clause makes clear that it was designed to protect citizens from being prosecuted upon unknown indictments for acts which occurred in the distant past. Furthermore, where the delay in prosecuting an individual is due solely to government inaction and the government's failure to have notified the accused of a criminal indictment pending against him, the Speedy Trial Clause mandates that the stale changes at issue be dismissed.

The Sixth Amendment to our United States Constitution provides, in part, "In all criminal prosecutions. the accused *shall* enjoy the right to a speedy and public trial . . . *and to be informed of the nature and cause of the accusation*. . . . " (emphasis added). Historically, the right to a speedy trial has been considered to be "one of the most basic rights" protected by our Constitution. *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967).

An analysis of the historical basis of the Speedy Trial Clause leads to but one source: Chapter forty of the Magna Carta of 1215 (later repeated in chapter twenty-nine of the 1225 version): "*Nulli vendemus, milli negabimus ant differemus rectum vel justiciam.*" ("To no one will we sell, to no one deny or delay right or justice.") Ayars, *We Hold These Truths: From Magna Carta to the Bill of Rights*, 7 (1977). The text of the Magna Carta contained no qualifiers or exceptions. Under its express terms, the only question for consideration is whether a criminal prosecution has been excessively delayed. Implicit in such protection is the notion that some appointed time should come when a citizen is entitled to repose; that there must

be some limit upon the sovereign's ability to delay revelation of an indictment and consequently delay criminal prosecution of an accused.

Thus, "[T]he Great Charter established a system of constitutional government . . which . . . guarantees to the individual man that administrative machinery, while guiding him and protecting him will not grind him down. . . . " Pound, *The Development of Constitutional Guarantees of Liberty*, 22 (3d printing 1960). The concept that justice should be delayed to no citizen was of unquestionable importance to the drafters of the Constitution. Indeed, "[T]he Framers seem clearly to have understood and valued the right in the context of its common-law antecedents." *Dickey v. Florida*, 398 U.S. 30, 41 (1970) (Brennan, J., concurring).

In *Klopfer v. North Carolina*, 386 U.S. 213 (1967), this Court held that, "[T]he right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." *Id.* at 223. It then traced the history of the Speedy Trial Clause to the Magna Carta enacted in the year 1215, and to the Assize of Clarendon enacted in 1166. *Id.* Citing Sir Edmund Coke as the preeminent legal authority to which the framers of our constitution referred, this Court stated, "To Coke, prolonged detention without trial would have been contrary to the long custom of England, *but he also believed that the delay in trial, by itself, would be an improper denial of justice.*" *Id.* at 224 (emphasis added) (footnote omitted). This Court further noted, "To Coke, . . . Magna Carta was one of the fundamental bases of English liberty." *Id.* at 225. It also observed that George Mason, the drafter of the Virginia Declaration of Rights of

1776 used language similar to Coke's in drafting that state's speedy trial declaration. *Id.*

William Penn, the founder of Pennsylvania, looked to and quoted verbatim Lord Coke when defining the meaning of justice. Penn, in the first commentary published in America on the Magna Carta, stated that one of the three essential elements of justice is that it "ought not to limp, or be granted piece-meal and [it should be] Celeris, speedily quia Dilatio est quaedum negatio, Delay is a kind of denyal. . . . " William Penn, *The Excellent Privilege of Liberty & Property Being the Birth-Right of the Free-Born Subjects of England*, (1687), set forth in full in Howard, *The Road From Runnymede; Magna Carta and Constitutionalism in America*, 424 (Appendix D) (1968).

That the drafters of the Bill of Rights considered the right to a speedy trial fundamental is reflected by the fact that at least four states had speedy trial provisions in their declarations of rights prior to enactment of the federal Bill of Rights. The first Virginia Declaration of Rights, provided that in all "criminal prosecutions a man hath a right . . . to a speedy trial. . . . " Va. Declaration of Rights, 1776, §8.

Likewise, Massachusetts, Pennsylvania and Delaware all had constitutionally recognized the right to a speedy trial. *Klopfer, supra*, at 225-226, n.21. By 1780, four of the original thirteen colonies, along with Vermont, had adopted "a speedy trial provision creating a fundamental right against which the government could not prevail." Poulos and Coleman, *Speedy Trial, Slow Implementation: The ABA Standards in Search of a State House*, Vol. 28, Hastings Law Journ., 357, 358 (1976) Ultimately, speedy

trial provisions proposed by the New York, North Carolina and Virginia ratification conventions led directly to the inclusion of a speedy trial provision within the Federal Bill of Rights. *Id.* at 360.[1] While commenting on the significance of the Fourth, Fifth and Sixth Amendments, this Court long ago noted that lack of inclusion of these "highly prized" rights caused "severe opposition" to the original constitution. *Ex Parte Milligan*, 71 U.S. (4 Wall.), 18 L.Ed. 281, 295 (1866).

For many years, the scope of the Speedy Trial Clause remained undefined by this Court. Although acknowledging the right of all citizens to enjoy a speedy trial in *Beavers v. Haubert*, 198 U.S. 77 (1905), this Court did not address the historical basis or scope of the right. In *Pollard v. United States*, 352 U.S. 354, 361 (1957) and *United States v. Elwell*, 383 U.S. 116, 120 (1966), this Court examined the right in light of "purposeful or oppressive" delay and "oppressive or culpable government conduct" but again failed to examine its scope in light of its historical underpinnings.

As previously discussed, in *Klopfer v. United States*, 386 U.S. 213 (1967), however, this Court engaged in an extensive analysis of the roots of the Speedy Trial Clause and concluded that the government may not "indefinitely postpone" the criminal prosecution of its citizens. In doing so, this Court specifically acknowledged the adverse impact *"the pendency of an indictment"* can have

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[1] *See, Creating the Bill of Rights, The Documentary Record from the First Federal Congress* (H. Veit, K. Bowling & C. Bickford, ed. 1991), for an excellent compilation of materials related to the creation of the Bill of Rights.

upon an individual. *Id.* at 222 (emphasis added). Similarly, in *United States v. Marion*, 404 U.S. 307 (1971), this Court held that the language and intent of the clause was clearly designed to protect only those in some way formally accused of a crime, noting, "[There] is nothing in the circumstances surrounding the adoption of the Amendment indicating that it does not mean what it appears to say. . . . " *Id.* at 314. This Court further held, "The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him." *Id.*

In a unanimous opinion, this Court in *Dickey v. Florida*, 398 U.S. 30 (1970), held that a seven-year delay between commencement of charges and trial violated the accused's right to a speedy trial. In doing so it reiterated the practical concerns which the Speedy Trial Clause is designed to protect. It noted: "The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges *promptly exposed*. . . . Stale claims have never been favored by the law, and far less so in criminal cases." *Id.* at 37 (emphasis added) (footnote omitted). Thus, in direct language this Court acknowledged the need to provide an accused notice of the charges against him.

In *Barker v. Wingo*, 407 U.S. 514 (1972), this Court explicitly rejected the concept that a defendant who fails to demand a speedy trial somehow waives his entitlement to it. Noting, that "[a] defendant has no duty to bring himself to trial," the Court concluded that an individual cannot be deemed to waive such a fundamental right on the basis of a silent record. *Id.* at 527. In other

words, while an individual can waive his right to a speedy trial by his affirmative act of avoiding such trial, he cannot be deemed to waive such right where he has no knowledge that it exists. Of significance to the present petition, this Court also found that "ex parte continuances," obtained without the accused's knowledge or consent, violated the Speedy Trial Clause. *Id.* at 536. Concurring in the Court's opinion, Justice White also noted the "inevitable personal prejudice" resulting from undue prosecutorial delay. *Id.* at 537.

This Court further refined the scope of the Speedy Trial Clause's protection in *United States v. MacDonald*, 456 U.S. 1 (1982). In doing so, however, it again specifically found that the "period after indictment must be considered in evaluating a Speedy Trial Clause claim." *Id.* at 7.

Current legal analysis in the state court system supports the view that the right protects citizens from unknown indictments:

> Although there is disagreement as to whether the filing of a secret indictment will trigger the speedy trial right prior to arrest, . . . there appears to be general consensus that the right to speedy trial attaches upon the formal filing of a public charge, at least if the charge is in a state form that would vest the court in which it is filed with jurisdiction to try the accused.
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> *[I]t is unrealistic to assume that no adverse consequences will flow from a publicly pending criminal charge, even if the accused remains unaware that it has been filed.*

State v. Mouser, 806 P.2d 330, 339 (Alaska App. 1991) (empahsis added) (citations omitted). Additionally, where

the government has failed to place an accused on notice of charges pending against him, he cannot be faulted with having failed to assert his right to a speedy trial:

> Defendant cannot fairly be expected to assert a right to a speedy trial of which he is totally unaware because of the People's failure to fulfill their duty to alert him to the charges and to his right to demand trial. Thus, in balancing their respective conduct, this "notice" factor, essential to an assertion of the demand for trial, weighs against the prosecution and in favor of the defendant.

People v. Vila, 162 Cal.3d 76, 87 (1984), 208 Cal. Rptr. 364, 371 (Cal.2d DCA, Div. 7 1984). *See also, Taylor v. United States*, 238 F.2d 259, 262 (D.C. Cir. 1956) (finding that appellant had been denied a speedy trial the court held, "This harm would have been avoided . . . by notice to appellant that he had been indicted.").

In conclusion, it is clear that an individual cannot demand a speedy trial where the government never informs him that it seeks to try him. Unknown and unnoticed indictments are antithetical to our entire system of constitutional government. In view of the "unbroken historical usage"[2] of the Speedy Trial Clause, the government's failure to notify petitioner of the indictment pending against him, coupled with its unexcusable

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[2] *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. ___, 113 L.Ed.2d 1, 31 (1991) (Scalia, J., concurring).

delay in bringing him to trial, compels this Court to reverse petitioner's conviction.

Respectfully submitted,

WM. J. SHEPPARD
(Counsel of Record)
ELIZABETH L. WHITE
SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661

Attorneys for Petitioner

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